Clifford. Bradley. Field.

316

March 1st 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 251.

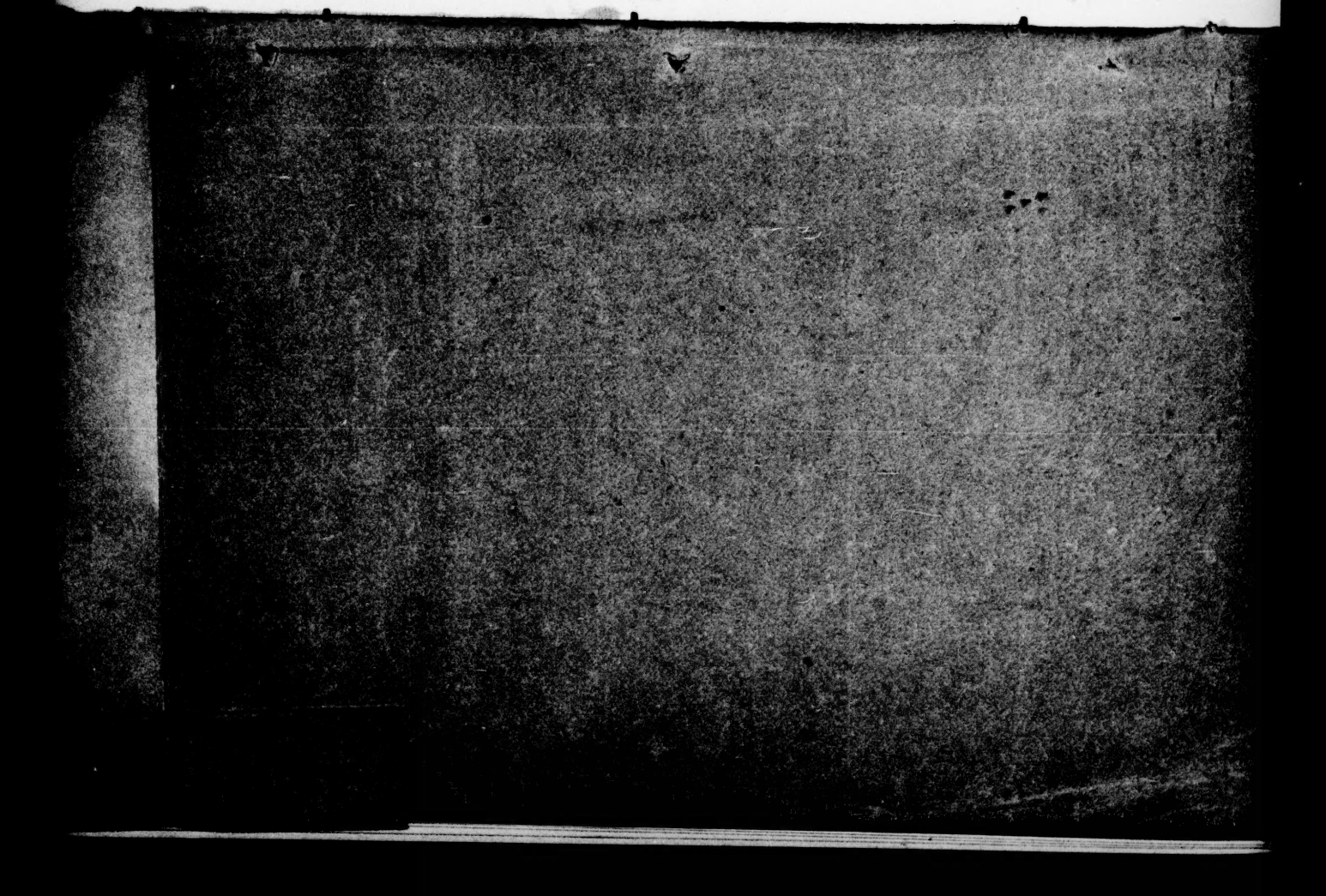
THE BARTLETT LAND AND LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL SAUNDERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED OCTOBER 11, 1878.



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1 UNITED STATES OF AMERICA,
New Hampshire District, ss:

At a circuit court of the United States for the first circuit, began and holden at Portsmouth, within and for the district of New Hampshire, on the eighth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, before the honorable Daniel Clark, judge of said court.

THE BARTLETT LAND AND LUMBER COMPANY, plaintiff,
v.
DANIEL SAUNDERS, DEFENDANT.

The writ in this cause is dated the 23d day of November, A. D. 1875, and was made returnable before the circuit court of the State of New Hampshire holden at Plymouth, in and for the eastern judicial district of the county of Grafton in the State of New Hampshire, on the first day of May, 1876. This cause was removed from said circuit court for the county of Grafton to this court, and here entered on the eighth day of May, A. D. 1876, on the first day of the May term, 1876, when the plaintiff filed in court certified copies of the following papers, namely,
the writ, petition for removal, bond, taxation of costs, docket
2 entries, and motion filed by defendant, being papers on file and of record in said circuit court for said county of Grafton, copies of which are hereto annexed under my attestation, as also is the order for removal to this court.

Upon the entry of this action in this circuit court of the United States at the May term, A. D. 1876, the parties appeared by their respective attorneys, and on the 24th day of July, 1876, the defendant filed his plea, and the plaintiffs, on the 27 day of Sept. thereafter filed their replication, copies of which hereinafter follow.

3 THE STATE OF NEW HAMPSHIRE,
Coos, ss:

To the sheriff of any county in this State, or his deputy:

We command you to summon Daniel Saunders, of Lawrence, in the county of Essex, and commonwealth of Massachusetts (if to be found in your precinct), to appear before the circuit court to be holden at Plymouth, in the eastern judicial district of the county of Grafton, on the first Tuesday of May next, to answer to the Bartlett Land and Lumber Company, a corporation existing under the laws of the State of Maine and doing business in said State, in a plea of land wherein the said company demand against the said Saunders a tract of land, not in any town, but situated in said eastern district of Grafton County,
bounded as follows, to wit: beginning at the northwest
4 corner of the town of Albany, and thence running north about 3 degrees east, three miles and 65 rods, to a spruce tree marked; and from thence north about 6 degrees east, 4 miles and 95 rods, to a fir-tree marked; and from thence south about 87½ degrees east, to the westerly line of Hart's location, and to the easterly line of Grafton County, as established by the act approved July 3d, 1875, entitled "An act establishing the east line of Grafton County;" and from thence along the east line of Grafton County to the bound begun at, and contain-

ing 8,000 acres of land, more or less, of which the said Saunders unjustly, and without judgment, disseized the said company within ten years last past. Whereupon the said company say, that within said ten years said company was seized of said land in fee, and ought now to be in possession, but said Saunders disseized said company, as
5 aforesaid, to the damage of said plaintiffs, as they say, the sum of one thousand dollars, to recover which, and the possession of aid land, this suit is brought.

And make return of this writ with your doings therein.

Witness William L. Foster, esquire, the 23d day of November, A. D. 1875.

[L. S.] M. A. HASTINGS, *Clerk.*

HILLSBOROUGH, *ss:*

JANUARY 6TH, 1876.

I summoned the within named Daniel Saunders, as within commanded, by giving to him an attested copy of this writ.

DAN'L. L. STEVENS,
Dep. Sheriff.

Fees: summons and travel, 62; copy, $1.00=$1.62.

6 THE BARTLETT LAND AND LUMBER COMPANY
vs.
DANIEL SAUNDERS.

To the circuit court, eastern judical district of Grafton County, New Hampshire, May term, 1876:

The petition of the Bartlett Land and Lumber Company, a corporation established by and existing under the laws of the State of Maine, and having its principal place of business at the city of Portland in said State, and incorporated by that name by the said State of Maine, respectfully shows:

That your petitioners are the plaintiffs in this suit, and that the same was brought by them against one Daniel Saunders, of Lawrence, in the county of Essex, and commonwealth of Massachusetts, defendant, on or about the 23d day of November, 1875, in the circuit court to be
7 held at Plymouth, in the eastern judical district of the county of Grafton and State of New Hampshire, on the first Tuesday of May, 1876; that the said defendant at the time of bringing this suit was and is now a citizen of the commonwealth of Massachusetts, and that your petitioners at the time of bringing this suit were and now are citizens of the State of Maine; that there is, and was at the time when this suit was brought, a controversy therein between citizens of the State of Maine, to wit, the said Bartlett Land and Lumber Company, plaintiffs, and a citizen of the commonwealth of Massachusetts, to wit, the said Daniel Saunders, the defendant.

That the said plaintiffs claim in their writ in this suit the ownership and possession of a certain tract of land of the said defendant not
8 in any town, but situated in said eastern district of Grafton County, containing, to wit, 8,000 acres, which tract is particularly prescribed in said writ and the same is of the value of 5,000 dollars and upwards; that said plaintiffs claim the sum of one thousand dollars as damages against the said Daniel Saunders, defendant in their writ aforesaid, in addition to the possession of said tract of land; that the matter in dispute in this suit therefor exceeds the sum of 500 dollars exclusive of costs; that this suit is now pending and has not yet

been tried; that the present term of the said circuit court holden at Plymouth as aforesaid, in the eastern judicial district of Grafton County, is the term at which said cause could be first tried; and that your
9 petitioners desire to remove this suit before the trial thereof into the next circuit court of the United States to be held in the district of New Hampshire pursuant to the provisions of the act of Congress approved March 3d, 1875, and entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes"; that your petitioners offer herewith their bond executed by as surety in the penal sum of 500 dollars, conditioned that they shall enter in the next circuit court of the United States to be held in the district of New Hampshire on the first day of its session a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court
10 of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners therefore pray that said bond may be accepted and that this suit may be removed into the next circuit court of the United States to be held for and within the district of New Hampshire pursuant to the laws of the United States in such case made and provided, and that no further proceedings may be tried therein in this court.

BARTLETT. LAND & LUMBER CO.,
By H. N. JOSÉ, *Treas.*

RAY, DREW & HEYWOOD,
WM. L. PUTNAM,
For Petitioners.

GRAFTON, *ss:*

MAY 4, 1876.

Personally appeared before me Ossian Ray, of Lancaster, N. H.,
11 attorney for said petitioners, and made oath that the matters alleged in the foregoing petition are true according to the best of his knowledge and belief.

CHAS B. GRISWOLD,
Justice of the Peace.

The Bartlett Land and Lumber Company, a corporation established by and existing under the laws of the State of Maine, and transacting business at the city of Portland, in said State, as principal, and Horatio N. José, of said Portland, and James B. Brown, of Northumberland, N. H., each as surety, are held and firmly bound unto Daniel Saunders, of Lawrence, in the county of Essex and commonwealth of Massachusetts, his heirs, executors, administrators, and assigns, in the
12 sum of 500 dollars, to be paid to the said Daniel Saunders, his heirs, executors, administrators, and assigns, for which payment the said principal binds itself, its successors, and assigns, and said surety binds himself, his heirs, executors, administrators, and assigns firmly by these presents, sealed with our seals, and dated May 3d, 1876.

Whereas, on or about the 23d day of November, 1875, a suit was brought by the said Bartlett Land and Lumber Company against the said Daniel Saunders, in the circuit court to be held at Plymouth, in the eastern judicial district of Grafton County and State of New
13 Hampshire, on the first Tuesday of May, 1876, and the same is now pending for trial in said court, and is removable into the circuit court of the United States for the district of New Hampshire, under the laws of the United States, to wit, the act of Congress, approved

March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes;"

And whereas the said Bartlett Land and Lumber Company have filed their petition in the circuit court for the eastern judicial district of Grafton County aforesaid for the removal of said suit into the next circuit court of the United States to be held in the district of New Hampshire:

Now, therefore, the condition of the above obligation is such that if the above-bounden Bartlett Land and Lumber Company, or their
14 legal representatives, shall enter in the circuit court of the United for the district of New Hampshire, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded to the said Daniel Saunders by the said circuit court of the United States if said court shall hold that said suit is wrongfully or improperly removed thereto, then the above obligation shall be void; otherwise in force.

BARTLETT LAND & LUMBER CO.,
By H. N. JOSÉ, *Treas.* [SEAL.]
H. N. JOSÉ. [SEAL.]
JAMES B. BROWN. [SEAL.]

In presence of—
WILLIAM L. PUTNAM to B. L. & L. Co. and H. N. J.
OSSIAN RAY to J. B. B.

15 Action at law.

BARTLETT LAND & LUMBER CO.
vs.
DANIEL SAUNDERS.

May term, 1876.—Circuit court.

Plf's costs.

Writ	1 00
Service	1 62
Att'y fee	1 00
Travel	3 50
Attendence	1 00
Entry	1 20
	$9 32

Civil docket Grafton County circuit court.—May term, 1876.

Docket entry.

Ray & Drew.

BARTLETT LAND & LUMBER CO.
vs.
DANIEL SAUNDERS. } 235.

W. L. Putnam; Bingham & Mitchell.

Petition to remove to U. S. C't.
Motion to quash.

16 GRAFTON, *ss:*

Circuit court E. J. D.—May T., 1876.

BARTLETT LAND & LUMBER CO.
vs.
DANIEL SAUNDERS.

In this case the defendant moves that the action be dismissed for the want of a proper endorsement of the plaintiff's writ before service thereof.

By his att'y:

HARRY BINGHAM.

17 THE STATE OF NEW HAMPSHIRE,
Grafton, ss:

Circuit court.

CLERK'S OFFICE.

I, Charles B. Griswold, clerk of the circuit court, hereby certify that the foregoing and annexed are true copies of all the papers, files, and records in the action wherein the Bartlett Land and Lumber Company are plaintiffs and Daniel Saunders is defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Haverill, this 6th day of May, 1876.

[SEAL.] CHAS. B. GRISWOLD, *Clerk.*

18 GRAFTON, *ss:*

Eastern judicial district.—May term, 1876, circuit court of New Hampshire.

THE BARTLETT LAND AND LUMBER COMPANY
vs.
DANIEL SAUNDERS.

Upon hearing the petition filed by the said Bartlett Land and Lumber Company, plaintiffs, for the removal of this suit into the circuit court of the United States for the district of New Hampshire, pursuant to the laws of the United States, and the said plaintiffs having filed a bond, with good and sufficient surety, conditioned according to the laws of the United States in such case made and provided, on motion of Ray, Drey & Heywood, attorneys for said plaintiffs, it is
19 hereby ordered that said petition and bond be accepted and approved, and the said suit be removed into the next circuit court of the United States to be held in the district of New Hampshire.

Witness the honorable Clinton W. Stanley, presiding justice of the circuit court of the State of New Hampshire, at the term thereof begun and held at Plymouth for and within said eastern judicial district of said county of Grafton, on the first Tuesday of May, 1876, and the seal of said court affixed this 18th day of May, 1876.

[SEAL.] CLINTON W. STANLEY,
Justice of the Circuit Court.

GRAFTON, *ss:*

Circuit court.

CLERK'S OFFICE.

The foregoing is a true copy of the order on file.

In testimony whereof, I have hereunto set my hand & affixed the seal of said court.

[SEAL.] CHAS. B. GRISWOLD, *Clerk.*

20 *Plea.*

Circuit court of the United States, New Hampshire district, ss.—May term, A. D. 1876.

THE BARTLETT LAND & LUMBER COMPANY
vs.
DANIEL SAUNDERS.

And now the said Saunders comes and defends his right to so much of the land described in the plaintiff's writ as is included and described as follows, to wit: Beginning at the northwest corner of the town of Albany, formerly called Benton, and thence running north about three degrees, east three miles and sixty-five rods to a spruce tree marked, and from thence north about six degrees, east four miles and ninety-five rods to a fir tree marked, and from thence south about eighty-
21 seven and one half degrees, east to the westerly line of Hart's location, thence southerly by the westerly line of Hart's location to the point in said westerly line nearest to the northwest corner of said Albany, thence in a strai't line to the northwest corner of said Albany; when, etc., and saith that he did not dissieze the demandants thereof, as they in their writ and declaration above suppose; and of this he puts himself upon the country.

By his att'ys:

HARRY BINGHAM AND
ALBERT R. HATCH.

And as to all the land in the demandants' writ and declaration described and claimed, not included in the description in the plea of the defendant above, wherein he hath pleaded that he did not dis-
22 sieze the demandants, the defendant saith that he cannot yield up the same with the appurtenances to the demandants, because he saith that he is not, and at the time of the purchase of the demandants' writ was not, or at any time afterwards hath been, tenant of the same; nor ever after the said times had or claimed, or now has or claimes, to have anything therein, but wholly disclaims to have anything in the same; and this he is ready to verify.

Wherefore he prays judgment, if the plaintiff his action aforesaid, as to so much thereof as demands anything not in the defendant's plea above described, may have or maintain, and for his costs.

By his att'ys:

HARRY BINGHAM AND
ALBERT R. HATCH.

Filed July 24, 1876.

23 *Replication.*

Circuit court of the United States, New Hampshire district. May term, 1876.

THE BARTLETT LAND & LUMBER COMPANY
vs.
DANIEL SAUNDERS.

And the plaintiffs as to that part of the said defendant's plea by him above pleaded, whereof he puts himself upon the country, doth the like.

By their attorneys:

WILLIAM L. PUTNAM &
RAY, DREW & JORDAN.

And as to that part and so much of the defendant's said plea as disclaims a portion of the demanded premises, the plaintiffs accept the same.

By their attorneys:

WILLIAM L. PUTNAM &
RAY, DREW & JORDAN.

Filed Sept. 27, 1876.

24 *Pl'ffs' bill of exceptions.*

Circuit court United States, district of New Hampshire. May term, 1878.

THE BARTLETT LAND & LUMBER COMPANY
v.
DANIEL SAUNDERS.

The cause came on for trial at this term before the Hon. Daniel Clark, judge, and a jury.

The pl'ffs put in copy of deed annexed to these exceptions from James Willey, land commissioner of the State of New Hampshire, to Alpheus Bean, Stephen Meserve, and Andrew Gilman, dated November 26, 1831. They also offered evidence showing authority on the part of said Willey, as land commissioner, to execute said deed, and put in sundry
25 conveyances which need not be made a part of these exceptions, tracing title to themselves of the tract conveyed by said deed from Willey. They also introduce a copy of a deed from A. B. Kelly, treasurer of New Hampshire, to Jasper Elkins and others, dated August 31, 1830, under which the defendant claims, which is annexed and made a part of this bill of exceptions.

Pl'ffs put in copy of the grant of Hart's location, so called, to Thomas Chadbourne, dated April 27, 1772, together with a copy of the plan referred to therein, which grant and plan are annexed hereto. Also copy of the Nathaniel Merill plan, so called, of said Hart's location, attested by B. F. Prescott, secretary of state, December 16, 1875, which is annexed. The act of December 30, 1803, and the amendment passed June 18, 1805, in relation to making and filing plans of towns, &c., in the
26 secretary of state's office, is made a part of this case, and may be referred to without being printed.

Pl'ffs also put in the resolve of July 3, 1830, a copy of which is hereto annexed, by authority of which resolve said deed to Jasper Elkins and

others was made. Pl'ffs put in as part of their chain of title as aforesaid a copy of a deed from Bean, Gilman, and Meserve to Reuben Harrington, dated November 3, 1832. Also copies of deeds Reuben Harrington to Amos Harrington and Eli Forbes, dated May 28, 1834, and Nathaniel A. Lyford and wife to George Forbes, dated April 25, 1852, which are annexed hereto.

The pl'ffs then called the following witnesses, viz, George W. M. Pitman, Joseph Pitman, Phillip C. Wilkins, James Rogers, Mark W. Pierce, and Daniel Elkins, who were each duly sworn and testified as follows:

27 Know all men by these presents, that I, James Willey, of Conway, in the county of Strafford, and State of New Hampshire, land commissioner of said State, by virtue of authority in me vested, agreeably to a resolve passed June twenty-second, one thousand eight hundred and thirty-one, for and in consideration of three hundred and twenty dollars to me in hand, before the delivery hereof, paid by Alpheus Bean, Stephen Meserve, and Andrew Gilman, all of Bartlett, in the county of Coos, and State aforesaid, gentlemen, have as commissioner aforesaid, for and in behalf of said State, remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim unto the said Alpheus Bean, Stephen Meserve, and Andrew Gilman, all the right, title, and claim, except the right of jurisdiction which said State now has or may hereafter have unto them,

28 the said Bean, Meserve, and Gilman, their heirs and assigns forever, the following tract of public land, described and bounded as follows, viz:

Beginning at the southwest corner of Hale's location, on Burton north ine; thence westerly on said Burton north line to the northwest corner thereof, being the southeast corner of Jasper Elkin's grant; thence northerly on the easterly line of said Elkins' grant to the northeast corner of said grant; thence easterly to Hart's location; thence southeasterly, by said Hart's location and the ancient southerly line of the town of Bartlett, to the northwest corner of Furnace's location; thence southerly on said Furnace's west line to the southwest corner thereof; thence easterly on said Furnace's south line to Conway west line to a hemlock tree, being the southeast corner of said Furnace's location; thence southerly on the west line of said Conway to the northeast corner of said

29 Hale's location; thence westerly on said location to the northwest corner thereof; thence southerly on the west line of said location to the first mentioned bound, containing sixteen thousand acres, be the same more or less, meaning all the public land not heretofore granted by the State of New Hampshire south of the road leading through the town of Bartlett to the notch.

To have and to hold the said remised premises, with all the privileges and appurtenances, to them, the said Alpheus Bean, Stephen Meserve, and Andrew Gilman, their heirs and assigns forever.

And I do hereby covenant with said Bean, Meserve & Gilman, their heirs and assigns, that I will warrant and defend the said premises to them against the lawful claims and demands of any person or persons claiming by, from, or under me, as land commissioner for the State aforesaid.

30 In witness whereof I hereunto set my hand and seal this

twenty-sixth day of November, in the year of our Lord one thousand eight hundred and thirty-one, in my official capacity aforesaid.

JAMES WILLEY, [L. S.]
Land Commissioner.

Signed, sealed, and delivered in presence of—
ISAAC MESERVE.
EZRA H. MESERVE.

STATE OF NEW HAMPSHIRE,
Coos, ss:

BARTLETT, *Nov.* 26, 1831.

Personally appearing, the above-named James Willey acknowledged the foregoing instrument to be his voluntary act and deed.
Before me.

GEORGE P. MESERVE,
Justice of the Peace.

STATE OF NEW HAMPSHIRE:

SECRETARY'S OFFICE,
Jan'y 4, 1832.

I certify the foregoing to be a true copy examined by me.

JOSEPH ROBINSON,
Deputy Secretary.

STATE OF NEW HAMPSHIRE:

SECRETARY'S OFFICE,
Aug. 13, 1875.

I certify the foregoing to be a true copy of the record.
Attest:
[SEAL.]

A. B. THOMPSON,
Deputy Secretary.

31 Know all men by presents that I, Abner B. Kelley, treasurer of the State of New Hampshire, by virtue of a resolution passed July 3, 1830, and in consideration of eight hundred dollars, by Jasper Elkins, Samuel H. Walker, Jacob Sargent, jun., Ebenezer P. Elkins, John Eaton, and David Perkins, all of Thornton, in the county of Grafton, and State aforesaid, secured to my satisfaction to be paid to the State of New Hampshire, in six equal annual payments, with interest, have released and conveyed, and do release and convey, unto the said Jasper, Samuel, Jacob, Ebenezer, John, and David, and their heirs and assigns, all the right and title which the said State of New Hampshire have unto a tract of land situated in the county of Grafton aforesaid, and described as follows, to wit:

32 Beginning at the northeast corner of the town of Lincoln and running east seven miles and one hundred and seventeen rods to Hart's location; thence southerly by the westerly boundary of said location to a point so far south that a line drawn thence due south shall strike the northwest corner of the town of Burton; thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern boundary of Hatch and Cheever's grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln and along this line to the point first mentioned.

To have and to hold the same to them, the said Jasper, Samuel,

others was made. Pl'ffs put in as part of their chain of title as aforesaid a copy of a deed from Bean, Gilman, and Meserve to Reuben Harrington, dated November 3, 1832. Also copies of deeds Reuben Harrington to Amos Harrington and Eli Forbes, dated May 28, 1834, and Nathaniel A. Lyford and wife to George Forbes, dated April 25, 1852, which are annexed hereto.

The pl'ffs then called the following witnesses, viz, George W. M. Pitman, Joseph Pitman, Phillip C. Wilkins, James Rogers, Mark W. Pierce, and Daniel Elkins, who were each duly sworn and testified as follows:

27 Know all men by these presents, that I, James Willey, of Conway, in the county of Strafford, and State of New Hampshire, land commissioner of said State, by virtue of authority in me vested, agreeably to a resolve passed June twenty-second, one thousand eight hundred and thirty-one, for and in consideration of three hundred and twenty dollars to me in hand, before the delivery hereof, paid by Alpheus Bean, Stephen Meserve, and Andrew Gilman, all of Bartlett, in the county of Coos, and State aforesaid, gentlemen, have as commissioner aforesaid, for and in behalf of said State, remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim unto the said Alpheus Bean, Stephen Meserve, and Andrew Gilman, all the right, title, and claim, except the right of jurisdiction which said State now has or may hereafter have unto them,

28 the said Bean, Meserve, and Gilman, their heirs and assigns forever, the following tract of public land, described and bounded as follows, viz:

Beginning at the southwest corner of Hale's location, on Burton north ine; thence westerly on said Burton north line to the northwest corner thereof, being the southeast corner of Jasper Elkin's grant; thence northerly on the easterly line of said Elkins' grant to the northeast corner of said grant; thence easterly to Hart's location; thence southeasterly, by said Hart's location and the ancient southerly line of the town of Bartlett, to the northwest corner of Furnace's location; thence southerly on said Furnace's west line to the southwest corner thereof; thence easterly on said Furnace's south line to Conway west line to a hemlock tree, being the southeast corner of said Furnace's location; thence southerly on the west line of said Conway to the northeast corner of said

29 Hale's location; thence westerly on said location to the northwest corner thereof; thence southerly on the west line of said location to the first mentioned bound, containing sixteen thousand acres, be the same more or less, meaning all the public land not heretofore granted by the State of New Hampshire south of the road leading through the town of Bartlett to the notch.

To have and to hold the said remised premises, with all the privileges and appurtenances, to them, the said Alpheus Bean, Stephen Meserve, and Andrew Gilman, their heirs and assigns forever.

And I do hereby covenant with said Bean, Meserve & Gilman, their heirs and assigns, that I will warrant and defend the said premises to them against the lawful claims and demands of any person or persons claiming by, from, or under me, as land commissioner for the State aforesaid.

30 In witness whereof I hereunto set my hand and seal this

twenty-sixth day of November, in the year of our Lord one thousand eight hundred and thirty-one, in my official capacity aforesaid.

JAMES WILLEY, [L. S.]
Land Commissioner.

Signed, sealed, and delivered in presence of—
ISAAC MESERVE.
EZRA H. MESERVE.

STATE OF NEW HAMPSHIRE,
Coos, ss:

BARTLETT, *Nov.* 26, 1831.

Personally appearing, the above-named James Willey acknowledged the foregoing instrument to be his voluntary act and deed.
Before me.

GEORGE P. MESERVE,
Justice of the Peace.

STATE OF NEW HAMPSHIRE:

SECRETARY'S OFFICE,
Jan'y 4, 1832.

I certify the foregoing to be a true copy examined by me.

JOSEPH ROBINSON,
Deputy Secretary.

STATE OF NEW HAMPSHIRE:

SECRETARY'S OFFICE,
Aug. 13, 1875.

I certify the foregoing to be a true copy of the record.
Attest:
[SEAL.]

A. B. THOMPSON,
Deputy Secretary.

31 Know all men by presents that I, Abner B. Kelley, treasurer of the State of New Hampshire, by virtue of a resolution passed July 3, 1830, and in consideration of eight hundred dollars, by Jasper Elkins, Samuel H. Walker, Jacob Sargent, jun., Ebenezer P. Elkins, John Eaton, and David Perkins, all of Thornton, in the county of Grafton, and State aforesaid, secured to my satisfaction to be paid to the State of New Hampshire, in six equal annual payments, with interest, have released and conveyed, and do release and convey, unto the said Jasper, Samuel, Jacob, Ebenezer, John, and David, and their heirs and assigns, all the right and title which the said State of New Hampshire have unto a tract of land situated in the county of Grafton aforesaid, and described as follows, to wit:

32 Beginning at the northeast corner of the town of Lincoln and running east seven miles and one hundred and seventeen rods to Hart's location; thence southerly by the westerly boundary of said location to a point so far south that a line drawn thence due south shall strike the northwest corner of the town of Burton; thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern boundary of Hatch and Cheever's grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln and along this line to the point first mentioned.

To have and to hold the same to them, the said Jasper, Samuel,

Jacob, Ebenezer, John, and David, and their assigns, forever. The said Jasper, Samuel, Jacob, Ebenezer, John and David having, at their own expense, caused the above-described tract of land to
33 be appraised by Daniel Hoitt, of Sandwich, Davis Baker, of Campton, and Jonathan Cummings, of Peymouth, esquires, which, appraised at the sum aforesaid, has been certified by said appraisers as the full amount of the value of said land.

In witness whereof I have hereunto set my hand and seal this thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty.

[L. S.] ABNER B. KELLEY,
Treasurer of the State of New Hampshire.

Signed, sealed, and delivered in presence of—
H. G. HARRIS.
NATHAN S. COLBY.

STATE OF NEW HAMPSHIRE,
Merrimack, ss:

AUGUST 31, 1830.

Personally appearing, Abner B. Kelley, above named, acknowledged the foregoing instrument to be his voluntary act and deed.
Before me.

HARRISON G. HARRIS,
Justice of the Peace.

34 OFFICE OF THE SECRETARY OF STATE,
Concord, 31st day of August, 1830.

A true copy of the original.
Attest:

DUDLEY S. PALMER,
Secretary of State.

STATE OF NEW HAMPSHIRE,
SECRETARY'S OFFICE,
Concord, August 12, 1875.

I hereby certify that the foregoing is a true copy of the record.
Attest:
[SEAL.] A. B. THOMPSON,
Deputy Secretary.

(Here follows map marked page 34, omitted by stipulation.)

35 PROVINCE OF NEW HAMPSHIRE.

George the Third by the grace of God, of Great Britain, France, [P. S.] and Ireland King, defender of the faith, &c. To all to whom these presents shall come, greeting:

Know ye that we, of our special grace, certain knowledge, and mere motion, for the due encouragement of settling and cultivating our lands within our province aforesaid, by and with the advice of our trusty and well beloved John Wentworth, esqr., our governor and commander-in-chief of our said province of New Hampshire and of our council of the same, have (upon the conditions and reservation herein particularly re-

cited and expressed) given and granted and by these presents for
36 us, our heirs and successors, do give and grant into our *leige* and loving subject, Thomas Chadbourne, of Portsmouth, in our said province, gentleman, and to his heirs and assigns forever, a certain tract or parcel of land containing by admeasurement three thousand acres, situate, lying, and being in our province aforesaid, as by a plan or survey thereof, exhibited by our surveyor-general of lands, for our said province by our said governor's order and returned into the secretary's office of our said province a copy whereof is hereunto annexed may more fully and at large appear butted and bounded as follows, vizt:

Beginning at a birch tree being the southwesterly corner bounds of a tract of land granted to Mr. Vere Royse; from thence running north four hundred and seventy rods, from thence extending westerly the same breadth of four hundred and seventy rods, the distance *the dis-*
37 *tance* of two hundred and eighty-five rods from thence running northwesterly six hundred rods, from thence running nearly a north course thirteen hundred rods until it meets the notch or narrowest passage leading through the White Mountains lying upon Saco River.

To have and to hold the said tract of land as above expressed to him the said Thomas Chadbourne and to his heirs and assigns forever upon the following terms, conditions and reservations, vizt:

First. That the said grantee shall cut, clear, and make passage for carriages, &c., a road of three rods, wide through the said tract, as shall be at any time hereafter directed or ordered by the governor and council aforesaid, which road shall be completed in one year from the date of such order or direction of the governor & council aforesaid on
38 penalty of the foreiture of this grant and of its reverting to us our heirs and successors.

Secondly. That the said grantee shall settle or cause to be settled five families in four years from the date of this grant, in failure whereof the premises to revert to us our heirs and successors, to be by us or them entered you and regranted to such of our subjects as shall effectually settle and cultivate the same.

Thirdly. That all white and other pine trees fit for masting our royal navy be carefully preserved for that use, and none to be cut or felled without our special license for so doing, first had and obtained you the penalty of the forfeiture of the right of the grantee in the premises his heirs and assigns to us, our heirs, & successors, as well as being
39 subject to the penalties prescribed by any present as well as future act or acts of parliament.

Fourthly. That any part of the said tract appearing to be well adapted to the growth of hemp or flax the said grantee shall sow and continue annually to cultivate a due proportion of the said land, not less than one hundred in every thousand acres with that beneficial articles of produce.

Fifthly. That the said grantee, his heirs and assigns, shall yield and pay unto us our heirs and successors yearly forever from and after the expiration of five years from the date of this grant one shilling proclamation money for every hundred acres he so owns, settles, or possesses, and so in proportion for a greater or lesser tract of the land aforesaid,
40 which money shall be paid by the respective proprietor, owner, or settler, in our council chamber in Portsmouth, or to such officer or officers as shall be appointed to receive the same. And these to be in lieu of all other rents and services whatsoever.

In testimony whereof we have caused the seal of our said province to be hereunto affixed.

Witness John Wentworth, esquire, our aforesaid governor and commander in chief, the twenty-seventh day of April in the twelfth year of our reign, annoque Domini, 1772.

J'. WENTWORTH.

By his excellency's command with advice of council.

THEODORE ATKINSON,
Sec'ry.

PROVINCE OF NEW HAMPSHIRE,
11*th May*, 1772.

41 Recorded in the secretary's office lib'r 1, folio 430.

Attest:

THEODORE ATKINSON,
Sec'ry.

Received the 13th Feb'y, 1788, and recorded according to the original under the then province seal.

Attest:

E. THOMPSON, *Sec'y.*

OFFICE OF SEC. OF STATE,
Concord, N. H., Dec. 16, 1875.

I hereby certify that the foregoing is a true copy of the original now on file in this office.

Attest:

[SEAL.] B. F. PRESCOTT,
Sec. of State.

Here follows map marked page 41, omitted by stipulation.

42 STATE OF NEW HAMPSHIRE:

In the year of our Lord one thousand eight hundred and thirty.

Resolved by the Senate and House of Representatives in general court convened, That the treasurer of this State be and he hereby is authorized to convey to Jasper Elkins, Samuel H. Walker, Jacob Sargent, jun., Ebenezer P. Elkins, John Eaton, and David Perkins, all of Thornton, in the county of Grafton, all the right and title which the State of New Hampshire have unto a tract of land situated in the county of Grafton aforesaid, and described as follows, to wit: Beginning at the northeast corner of the town of Lincoln and running east seven miles and one hundred and seventeen rods, to Hart's location, thence southerly by the western boundary of said location to a point so
43 far south that a line drawn thence due south shall strike the northwest corner of the town of Burton; thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern boundary of Hatch's and Cleves' grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln, and along this line to the point first mentioned; provided that the said Jasper Elkins, Samuel H. Walker, Jacob Sargent, jun., Ebenezer P.

Elkins, John Eaton, and David Perkins, shall, at their own expense, cause the same to be appraised by Daniel Hoit, of Sandwich, Davis Baker, of Campton, and Jonathan Cummings, of Plymouth, esquires; which appraisal certified by said appraisers as the full amount
44 of the value of said land, and said sum secured to the satisfaction of the treasurer of this State, payable in six equal annual payments, with interest, rec'oning from the first day of June, A. D. one thousand eight hundred and thirty, shall be the consideration of said conveyance. Provided, also, that it shall not be lawful for said treasurer to make said conveyance after the first Wednesday of June, which will be in the year of our Lord one thousand eight hundred and thirty-one.

SAM'L C. WEBSTER,
Speaker of the House of Representatives.
JOSEPH M. HARPER,
President of the Senate.

Approved July 3, 1830.

MATTHEW HARVEY,
Governor.

45 STATE OF NEW HAMPSHIRE:
SECRETARY'S OFFICE, CONCORD.
May 11, 1878.

I hereby certify that the foregoing is a true copy of the engrossed resolution.

In testimony whereof I have hereunto subscribed my official signature, and affixed the seal of the State.

[SEAL.] A. B. THOMPSON,
Secretary of State.

46 *Meserve & others to Harrington.*

Know all men by these presents that we, Stephen Meserve, Andrew Gilman, and Alpheus Bean, all of Bartlett, in the county of Coos, & State of New Hampshire, in consideration of ten thousand dollars paid by Reuben Harrington, of Southbridge, in the county of Worcester, and commonwealth of Massachusetts, physician, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey, unto the said Reuben Harrington, his heirs, and assigns, three undivided quarter parts, in common with William Towle, of Porter, in the State of Maine, of the following described tract of land situated in said Bartlett, and adjacent thereto, containing fifteen thousand acres in the whole, and agreeably to a plan and survey of the same made by James Willey, land commissioner of the State of New Hampshire, reference
47 thereto being had, and bounded, and described as follows, namely:

Beginning on the southwest corner of James Willey's land, on the west side of Hale's location, thence running north eighty-four degrees, west two thousand eight hundred and eighty rods, to Jasper Elkins' grant, thence north, on the east line of said grant, two thousand and sixty rods to the south line of Jacob Sargent's grant, thence east one hundred and seventy rods to Hart's location, thence southeasterly, by the west line of said location, and the ancient southerly line of said Bartlett, and the several subsequent grants, to the northwest corner of Furness location, thence southerly, by said location and said Willey's west line, to the first bound mentioned, being the same tract of land

which was sold and conveyed to the within named grantors, by the said James Willey, one undivided quarter part of which was sold
48 by the said grantors to the aforenamed Towle, by deed dated August seventeenth, A. D. eighteen hundred and thirty-two; the date of said Willey's deed was November twenty-sixth, eighteen hundred and thirty-one.

To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging to the said Reuben Harrington, his heirs, and assigns, to his and their use and behoof, forever.

And we, the said Stephen, Andrew, and Alpheus, for ourselves and our respective heirs, executors, and administrators, do covenant with the said Harrington, his heirs, and assigns, that we are lawfully seized in fee of the aforegranted premises, that they are free from all incumbrances, that we have good right to sell and convey the same to the said Harrington as aforesaid, and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said
49 Harrington, his heirs, and assigns forever, against the lawful claims and demands of all persons.

In witness whereof, we the said Stephen Meserve, Andrew Gilman, and Alpheus Bean, have hereunto set our hands and seals, this third day of November, the year of our Lord, eighteen hundred and thirty two.

Executed and delivered in presence of us.

STEPHEN MESERVE. [L. S.]
ANDREW GILMAN. [L. S.]
ALPHEUS BEAN. [L. S.]

Witnesses to the signature of Andrew Gilman and Alpheus Brown:
THOMAS A. DEXTER.
BENJA. PERYS.

Witnesses to the signature of Stephen Meserve:
JONATHAN TASKER.
EZRA H. MESERVE.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, City of Boston, ss:

Be it known that on the day of the date hereof, before me subscriber, a commissioner duly appointed by the authorities of the State of New Hampshire, within and for the commonwealth of Massachusetts, and qualified to take acknowledgements and proofs of deeds and instruments under seal, to be used or recorded in the former State, personally appeared Andrew Gilman and Alpheus Bean, two of the within
50 named grantors, and acknowledged the within instrument by them executed to be their voluntary act and deed.

Witness my hand and seal at Boston this third day of November, in the year of our Lord one thousand eight hundred and thirty-two.

[L. S.] THOMAS A. DEXTER,
Commissioner State of New Hampshire.

COOS, *ss:*

BARTLETT, *December 11th*, 1832.

Personally appeared Stephen Meserve, and acknowledged the within-written instrument to be his voluntary act and deed.

Before me,

JONATHAN TASKER,
Justice of the Peace.

COOS, *ss:*

Dec. 13th, 1832, rec'd, recorded, & examined by R. Stephenson, reg.

COOS, *ss:*

REGISTER'S OFFICE,
Jan'y 4th, 1876.

I hereby certify that the within and foregoing is a true copy of Coos County Records, vol. 21, pages 225 & 226.

Examined. Attest:

J. W. FLANDERS,
Register.

51 Know all men by these presents that I, Reuben Harrington, of Southbridge, in the county of Worcester and commonwealth of Massachusetts, physician in consideration of one thousand dollars to me paid by Amos Harrington, of Brookfield, and Eli Forbes, of North Brookfield, both in the county of Worcester aforesaid, the receipt whereof is hereby acknowledged, do by these presents grant, remise, release, and forever quitclaim unto the said Amos and Eli, their heirs and assigns, all my right, title, interest, and estate in and to a certain tract of land situate in the town of Bartlett, in the county of Coos and State of New Hampshire, containing fifteen thousand acres in the whole, and is bounded as follows, viz:

Beginning at the southwest corner of James Willey's land on the west side of Hale's location and running north 84° west two
52 thousand eight hundred and eighty rods to Jasper Elkin's grant; thence north on the east side of said grant two thousand and sixty rods to the south line of Jacob Sargent's grant; thence east one hundred and seventy rods to Hart's location; thence southeasterly to the west line of said location and the ancient southerly line of said Bartlett and the subsequent grants to the northwest corner of Furness location; thence southerly by said location and said Willey's west line to the first-mentioned corner. The above-granted premises are the same which were sold and conveyed to me by Stephen Meserve, Andrew Gilman, and Alpheus Bean by their deed, dated the third day of November, in the year one thousand hundred and thirty-two, meaning by this deed to convey three undivided fourth parts thereof common with William Towle, of Porter, in the State of Maine.

53 To have and to hold the above-released premises to them, Amos and Eli, their heirs and assigns, to them and their use and behoof forever, so that neither I, the said Reuben Harrington, nor my heirs, or any other person or persons claiming by, from, or under me or them or in the name, right, or stead of me or them shall or will by any way or means have, claim, or demand any right or title to the above-released premises, or to any part or parcel thereof forever.

In witness whereof I, the said Reuben Harrington, together with Anna Harrington, my wife, in token of relinquishment of her right of dower in the above-described premises, have hereunto set our hands and seals this twenty-eighth day of May, in the year of our lord eighteen hundred and thirty-four.

REUBEN HARRINGTON. [L. S.]

Signed, sealed, and delivered in presence of us—
CYRUS SAMPSON.
EPHREM M. HOWE.

54 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:
MAY 28, A. D. 1834.

Then personally appeared the above-named Reuben Harrington, and acknowledged the above instrument to be his free act and deed.
Before me,
ABNER MOORE,
Justice of the Peace.

COOS, *ss:*
July 16, 1834, rec'd, recorded, and examined by R. Stephenson, reg'r.

55 Know all men by these presents that I, Nathaniel A. Lyford, and I, Emeline F. Lyford, wife of said Nathaniel, of Syracuse, county of Onondaga, and State of New York, in consideration of three hundred dollars paid to us by George Forbes, of Brookfield, in the county of Worcester, and State of Massachusetts, the receipt whereof we do hereby acknowledge, do hereby grant, sell, and quitclaim unto the said George Forbes, his heirs and assigns, all our right, title, claim, and demand in and unto a certain tract of land situated in the town of Bartlett, in the county of Coos, and State of New Hampshire, containing about fifteen thousand acres in the whole, and lying in common with the land of Josephas Baldwin, of Nashua, New Hampshire; Lawrence
56 Barnes, of Biddeford, Maine, and others; said tract being known as the Meserve, Gilman, and Bean purchase, meaning to convey by this deed to convey all the right and title which the said Nathaniel and Emeline have in said land as legatees under the will of Eli Forbes, late of North Brookfield, in the county of Worcester, and State of Massachusetts, deceased.

To have and to hold the same to the said George Forbes, his heirs and assigns, to his and their use and behoof, forever.

And we do covenant to warrant and defend said granted and quitclaimed premises to the said George Forbes, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by or under us.

In witness whereof we, the said Nathaniel A. Lyford and Emeline F. Lyford in her right, have hereunto set our hands and seals this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty-two.

57 N. A. LYFORD. [SEAL.]
EMELINE F. LYFORD. [SEAL.]

Signed, sealed, and delivered in presence of us:
EDWARD S. DAWSON.
LYMAN DOANE.

STATE OF NEW YORK,
Onondaga County, ss:

On this 26th day of April, 1852, before me, came Nathaniel A. Lyford and Emeline F., his wife, to me known to be the persons described in and who executed the within instrument, and severally acknowledged that they executed the same; and the said Emeline on a private examination, separate and apart from her husband, acknowledged that she executed the same freely and without fear or compulsion of her said husband.

EDWARD S. DAWSON,
Com'r of Deeds.

58 STATE OF NEW YORK,
Onondaga Co., ss:

CLERK'S OFFICE.

I certify that Edward S. Dawson, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a commissioner of deeds in and for said county, and duly authorized to take the same, and that I am well acquainted with his handwriting and verily believe that the signature to said certificate is genuine. And I further certify that the said instrument and the acknowledgment thereof are executed according to the existing laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Syracuse, this 26th day of April, 1852.

[SEAL.] RUFUS COSSIT, *Clerk.*

59 G. W. M. PITNAM, being duly sworn, testifies in answer to the following interrogatories:

Q. 1. Where do you reside?

A. In Bartlett, south part, called Lower Bartlett.

Q. 2. How long have you resided there?

A. Some 59 years.

Q. 3. What is your age?

A. 59 years.

Q. 4. What is your profession?

A. A. lawyer, and practice sometimes.

Q. 5. Have you had any experience in surveying lands and running lines; and, if yes, what experience?

A. I have had some experience in surveying. I have had more or less for the last 30-odd years.

60 Q. 6. What proportion of the time have you given to surveying and examining lines?

A. I am not able to say precisely, but in the spring and the fall I have devoted some considerable time to the business, perhaps two months in the year.

Q. 7. What personal knowledge have you of the lands lying about your vicinity?

A. I have surveyed a large portion of the lands in that vicinity.

Q. 8. Within what limits from Bartlett have you made your surveys?

A. Within a circle of perhaps 20 miles.

Q. 9. Is there a tract of land known as the Bean, Gilman and Meserve purchase?

A. There is.

Q. 10. Have you ever been on it?

A. I have.

Q. 11. When first?

61 A. Perhaps some 20-odd years ago was the first time I was ever on the tract.

Q. 12. How many times have you been on it?

A. I am not able to state; a great many times.

Q. 13. For what purpose have you been there?

A. For the purpose of making surveys on the various parts.

Q. 14. Which side of the river is that tract?

A. On the west side of the Saco River.

Q. 15. Is there a stream there known as Sawyer's River?

A. There is.

Q. 16. How is the tract with reference to Sawyer's River?
A. Sawyer's River runs through a portion of this tract?
Q. 17. Sawyer's River is a branch of the Saco?
A. It is; it empties into the Saco River in Hart's location.
Q. 18. Running?
62 A. Easterly till it unites with the Saco, and then the course of the Saco is southerly.
Q. 19. Say whether or not there is in your vicinity a tract called Elkin's grant?
A. There is.
Q. 20. How does that tract lie with reference to the Bean, Gilman and Meserve tract?
A. Westerly of it.
Q. 21. State whether or not there is a tract of land known as the Vere Royce tract.
A. There is.
Q. 22. Where is that?
A. That tract lies easterly of the Bean, Gilman and Meserve tract.
Q. 23. State whether or not the Vere Royce tract lies on the Saco River.
A. It does.
Q. 24. And upon one or both sides of the Saco?
63 A. Partly on both sides. Most of it on the westerly side of the Saco.
Q. 25. Is it above the village of Upper Bartlett?
A. The village of Upper Bartlett is upon the Vere Royce tract. (Shows plan to the jury.)
Q. 26. State whether or not the Vere Royce tract is an ancient grant?
A. It is one of the ancient grants in that vicinity.
Q. 27. Whether or not the up-river line of it is a known line?
A. It is.
Q. 28. Anciently known?
A. It is. I have known it for the last 30 odd years.
Q. 29. How far is it from the northerly or up-river line to the gate of the notch?
64 A. I think by the road it would be some 13 miles, or more.
Q. 30. Does the road follow the river?
A. It does northerly.
Q. 31. How far, according to your best judgment, in a direct line?
A. I think about 2 miles short of that, in a direct line.
Q. 32. By the gate of the notch, you mean. What part of the notch?
A. I mean the narrowest part of the notch, which is through the White Mountains, what is called the gate of the notch. It is near the new Crawford House.
Q. 33. How near the head waters of the Saco is it?
A. Very near. The Saco takes it rise from a point very near,
65 perhaps 50 or 100 rods from the gate of the notch.
Q. 34. Have you heard of a location or grant known or called Hart's location?
A. I have; the original name was Chadbourns.
Q. 35. State whether or not that location, within your knowledge, has ever been marked upon the ground on the face of the earth; and, if yes, when?
A. I made a survey of that tract in 1859, I think.

Q. 36. Previous to that time had it ever been, so far as you know, marked or located on the ground?

A. I don't think the exterior lines had ever been put on the ground previous to that. Some lots had been surveyed out of that tract, and there were settlements upon Hart's location.

66 Q. 37. When did you make your survey; in 1859, was it?

A. Yes.

Q. 38. At whose request did you make that survey?

A. At the request of Dr. Sam'l A. Bemis.

Q. 39. Was he then claiming to own the grant?

A. Yes.

Q. 40. In making that survey did you find any indications of an old exterior line of the grant?

A. I did not.

Q. 41. Did you look for one?

A. We did.

Q. 42. How, then, did you run or locate the grant; in what way?

67 A. At that time we run the road for a base line, and then plotted the tract, taking the width stated in the charter, making as few outer lines as possible, as few angles as possible.

Q. 43. The width in the charter is what?

A. 470 rods. We surveyed it of a uniform width throughout.

Q. 44. Can you tell about how many courses you run?

A. Some 5 or 6; run 5 courses for the outer lines, the side lines of Hart's location.

Q. 45. Did you locate the tract equally on each side of the river?

A. I did not. I had no reference to the river as to the location of the tract, but surveyed the tract in the best shape we could according to the charter as I understood it.

Q. 46. Do you recollect the terms of the charter; have you them in your mind?

68 A. I don't know that I could give the precise phrasiology. The charter begins at the S. W. corner of Vere Royce location, "beginning at a birch tree, being the southwest corner of a tract of land granted to Vere Royce, thence north 470 rods," &c.

Q. 47. Is that where you commenced or substantially where you commenced?

A. When I run out the tract, part of this had been annexed to the town of Bartlett. I commenced at what is called Sawyer's Rock, and have since connected it with this.

Q. 48. The 470 rods spoken of there, you understood to be the width of the tract?

A. Yes.

Q. 49. Read on.

69 A. Thence extending westerly the same bre'dth of 470 rods, the distance 285 rods, from thence running N. W. 600 rods, from thence running nearly a north course, 1,300 rods, till it meets the notch or nearest passage leading through the White Mountains and lying on Saco River.

Q. 50. How many courses are there?

A. Three (3) courses.

Q. 51. Would the length of these courses bring you to the notch?

A. It would not.

Q. 52. How far short of it would it fall?

A. The courses named here would be 2,185 rods, a little short of seven

miles, and the distance would be over 13 miles. It would be some 6 or 7 miles.

Q. 53. That tract there is estimated as containing about 3,000 acres by measurement. How much in your judgment did the tract
70 contain that you laid off as Hart's location?

A. I have not computed the area, but I should judge some 11,000 acres.

Q. 54. From your experience as a surveyor, say whether or not that tract could be located according to the courses and distances in that grant at the same time following the river?

(Objected to.)

Q. 55. I desire to know from your experience as a surveyor, and your knowledge of the ground, if that location can be actually put on the earth as shown by that plan, taking the termini named in the charter, the birch tree and the gate of the notch, and the plan and the distance named?

71 A. You could not do it. The courses may be run because they are very indefinate; the courses are westerly, northwesterly and northerly, which would allow the surveyor to assume most any course. You can keep the river within this course so far as the distances will allow you to go, but the charter don't give you but about ⅔ distance between the termini.

Q. 56. Have you attempted to run any lines upon or around Elkins Grant?

A. I have attempted to run the east and north lines of Elkins Grant.

Q. 57. When did you first make the attempt?

A. I think the latter part of June, 1875, first.

Q. 58. Who was with you at that time?

I had a Mr. Carleton, a man by the name of Nute an' Abbott and Frederick Pitman. I was next upon it in August of the same year.

72 Q. 59. Who was with you then?

A. I think Joseph Pitman was with me then, a Mr. Nute and Sinclair, and I don't recollect the other. I think I had another man at that time.

Q. 60. When next on it?

A. Next in October of the same year.

Q. 61. Who was with you then?

A. I had Joseph Pitman, Mr. Sinclair, and a Mr. Chandler, I think.

Q. 62. When next upon it?

A. In the fall of 1876.

Q. 63. What part of the year?

A. I think in September.

Q. 64. Who was with you then?

A. Joseph Pitman and Alonzo Smith.

73 Q. 65. Have you been there since?

A. Not to make any survey.

Q. 66. With any person or for any purpose?

A. I have been on the line since to look at the situation. Yes, I was there last year, or this year rather.

Q. 67. With whom?

Mark W. Pierce and James Rogers.

Q. 68. When was that?

A. I have forgotten the date of that.

Q. 69. At any of these times were you working on what you supposed was the east line of Elkins grant?

A. That is what I understood.

Q. 70. That line you were working on, where was its southern terminus, or where did it begin?

74 A. It began at the N.W. corner of Albany now, formerly Burton, southern terminus of the line.

Q. 71. Have you had any previous knowledge of that corner?

A. I have.

Q. 72. How long have you known it?

A. That corner of Albany some 30 years.

Q. 73. When you first knew it what was there to mark it?

A. A hemlock tree when I first knew it.

Q. 74. Tree marked?

A. It was marked.

Q. 75. How marked when you first knew it?

A. I mean it was marked by a blaze on three sides. I don't know that I examined the westerly side of it. It was marked as a line

75 tree, a corner tree on the south, east, and north. There were also letters on the tree, initials of names.

Q. 76. How old were the marks, apparently?

A. We tried the tree at the time and I think we counted some over 50 grains.

Q. 77. That would indicate it was marked about what time, about what year?

A. It would indicate the number of years. The number of grains would give the number of years; it had been marked at that time over 50 years, apparently from the grains; it would be rising of 80 years, between 80 and 90.

Q. 78. Had you any special duty?

A. I had; it was for the purpose of making examination for the purpose of ascertaining the age of the corner. The towns of Bartlett

76 and Albany had a suit with reference to that line, and I was there to examine it.

Q. 79. Did you ever see or hear of any other marked N.W. corner of Albany, except that?

A. Never did.

Q. 80. State whether or not at that time that tree was pointed out to you by any person as the corner?

A. It was.

Q. 81. Any person now deceased?

A. Yes; Anzi Russell; he was a surveyor; he pointed it out to me.

Q. 82. How old a man was he at that time?

A. He must have been in the neighborhood of 50.

Q. 83. Where did he live?

A. In Albany.

77 Q. 84. Anybody else point it out?

A. There were other men there; I think the authorities of Albany were there; I am unable to say who at the present time.

Q. 85. When you went there in 1875 did you find that hemlock tree?

A. We found the stub. It had been broken off. The stub remained there.

Q. 86. In the year 1875 what work did you do on this line? Describe generally how far you went and where you commenced.

A. In 1875, in June, we commenced at that corner and run some three miles till we past over the river—over Sawyer's River—retraced the line that distance.

Then later in 1875 what did you do?

A. Run the whole length of the line, and run the north line in 1875.

78 Q. 88. In 1876?

A. We retraced the east line and examined it carefully.

Q. 89. Did you go on the north line again?

A. Only a short distance.

Q. 90. State what running you made in 1875, commencing at this corner of Albany, and which way you run and what you found.

A. We commenced at this hemlock stub and run north about 2½° east. We didn't find a very good line for 50 or 100 rods perhaps. We got up there about half a mile and found ourselves a little to the west of the old line; then we traced that line back to the corner, and then we started on and traced that line till we passed Sawyer's River some three miles. We examined the line as to the age and we found 46

79 grains as being the age of the line. At that point we found some trouble about tracing the line. That was about 60 or 70 rods north of Sawyer's River.

Q. 91. How far from the corner of Albany?

A. A little better than three miles, about 3¼ miles. Not finding that line continueing straight I run the same course up the length of the grant. Then in August I commenced at that place at the "3 mile tree."

Q. 92. This place where you lose the line before?

A. Yes. Made an examination and found the line continued from that point, but it run a little further into the east, some 3 or 4 degrees out of the course that I had been running. I traced that line from there to the north line of Elkins grant.

Q. 93. What did you find at the north line of Elkins grant?

80 A. I found a fir tree.

Q. 94. Marked in any way?

A. Marked as a corner.

Q. 95. Any other trees spotted in the neighborhood of that tree?

A. There were two or three spotted near that tree.

Q. 96. These that were spotted near it, what are they called by surveyors?

A. We call them witnesses of the corner.

Q. 97. How far was that fir tree from the Saco River or turnpike?

A. One mile and 256 rods to the turnpike.

Q. 98. How was that tree with reference to the height of land?

A. It was some 8 or 10 rods on the eastern side of the ridge.

81 Q. 99. The water on the east side runs into what river?

A. On the east side runs into the Saco River, and on the west side into the Pemigewassett.

Q. 100. And the Elkins tract lies on what stream and vallies?

Generally into the Pemigewassett.

Q. 101. This tree was just over the brow of the divide between that valley and the Saco River?

A. Yes.

Q. 102. Be kind enough to show the jury the courses that you have just described.

(Shows the jury the plan.)

Q. 103. This line which you say you traced from the corner of Albany to the fir tree runs about what course?

A. The first south part of the line the course would be about

82 north 3° east, a little strong, and from the angle up it would be north 6° or 7° east.

Q. 104. What is the variation of the compass in that locality for the last 40 years?

A. I started presuming that the variation was 2½°; that was about the variation that I supposed should be made.

Q. 105. How long was that line?

A. 7½ miles.

Q. 106. Which side of Sawyer's pond did that line run?

A. Westerly of Sawyer's pond.

Q. 107. Is Sawyer's River the outlet of Sawyer's pond?

A. It is.

Q. 108. The line crosses Sawyer's River?

A. Yes, it crosses it; two branches of it; it crosses pond branch
83 westerly of the point, and then it crosses the main stream of Sawyer's River.

Q. 109. Did you see a new mill up there, or a mill in process of erection when you first went up there in 1875?

A. I did.

Q. 110. Was it then in process of erection?

A. They were at work there; I don't know at what stage the mill was; they were at work cutting out some timber for the mill.

Q. 111. Is that the mill reputed to be Saunders mill?

A. I so understood it.

Q. 112. Which side of that mill did this line run?

A. Westerly of the mill. In reference to the distance from Elkins to the turnpike I stated from recollection it was one mile—256 rods. I find on looking at my minut's it is 626 rods from the fir tree to the turnpike road.

84 Q. 113. How does this line which you have described correspond with the description which I have read?

A. Very nearly.

Q. 114. Wherein does it differ?

A. The line from the hemlock stump, 3 miles and 65 rods, may be from 2½ to 3½ degrees, the general course about 3 degrees, and from that angle to the fir tree the general course may be perhaps from 6 to 7 degrees east.

Q. 115. As far as movements are concerned, how do they agree?

A. Precisely.

COURT. What is that description which you read to him?

COUNSEL. It is a copy of the writ—the line as we allege it in the writ.

85 Q. 116. Now, was this line equally well marked through its whole length from the corner of Albany to the fir tree?

A. From the corner of Albany to Nancy's Brook we found the line somewhat older than from that point to the fir tree, but the line was very well defined on the ground.

Q. 117. Nancy's Brook was how far from the north line of Elkins grant?

A. Some one and ½ mile, perhaps.

Q. 118. Now going back to the corner of Albany at this hemlock tree, the line that was spoken of, starting out on the line you have been speaking of, what mark did you find first?

A. We found trees spotted regularly for a line and then some trees spotted indicating corners.

COURT. Where was that—on the easterly line?

86 A. Yes; some 200 rods and better we found a tree indicating a corner, and lines running westerly from these trees.

Q. 119. These lines ran at what angle?

A. About at right angles with this line.

Q. 120. What, according to your judgment as surveyor, were these lines?

A. I took them to be lot lines.

Q. 121. On what grant?

A. Elkins grant.

Q. 122. Lots about how large, should you judge; how far apart were these corner trees?

A. I think some 200 rods and better.

Q. 123. Did you find anything to indicate that the land east of that line had been allotted?

A. Not anything.

87 Q. 124. Understand you to say that you found some spottings that were over 40 years old. How far from the corner of Albany?

A. I think some half a mile, or more than half a mile, that I found old spotting.

Q. 125. Where next did you find the oldest spotting?

A. All the way on the line. We tried several of the trees as I passed along, but we found the old spottings all along through the whole length of the line with the exception of a little distance at the north end.

Q. 126. Did you at any place count the grains?

A. We did.

Q. 127. What number of grains did you find?

A. What we tried in 1875 I counted 45 grains; what we tried in 1876 I counted 46 grains, I think.

88 Q. 128. Now, take this that you counted in 1875, 45 grains; from your experience as a surveyor, that would indicate how old a line? What part of 1875 did you count them?

A. It was in the fall, I think, that we counted mostly. We counted some in June. It depends on the season very much in regard to the grain. If the tree is spotted in the spring you may get a grain if it is spotted before the saliva makes. If it is after the saliva is formed, you will not get a grain the first year so that it may be 45 or 46; if the line was spotted in the fall it would be 45 (45) years; would indicate 45 years.

Q. 129. If the line was spotted in the spring it would indicate what?

A. You might get an additional grain—get a grain in 6 mos. or 3 mos.

89 Q. 130. In what year were these trees probably spotted?

A. Those on the east line were probably spotted about 1830.

Q. 131. State whether or not they may have been spotted in 1829.

A. That might have been.

Q. 132. What as to the probability of their having been spotted in 1831?

A. That may be true.

Q. 133. But the weight of your opinion is they were spotted in 1830?

A. I judge the line was made there in 1830 from the appearance of the trees. I tried many of them.

Q. 134. Did you find any spotting that was later than this you have spoken of?

A. We did. We found this line respotted thoroughly from

90 end to end. We also found a spotting of more recent date but not regular—some recent spottings in various places on the line.

Q. 135. When you say spotted thoroughly from end to end?

A. I mean the line that is respotted for a renewal of the line from corner to corner.

Q. 136. State about how old that line was in your judgment.

A. I should think that might have been respotted somewhere about 1850.

Q. 137. Have you any chips from that line?

A. I have.

Q. 138. Produce them. (They are produced.)

A. The 1st is cut out 340 rods from the corner, from the hemlock corner, Sept. 20, 1876. The 2d, this was cut out near the two-mile
91 tree. 3d, that was cut out near the bank of Sawyer's River, Sept. 20, 1876. 4th chip was cut out on the east line but it don't bear any mark.

Q. 139. Here is one chip cut out near the south bank of Sawyer's River; that was cut out by you?

A. It was either by myself or my man with me.

Q. 140. How many grains do you find there according to your best count?

A. My best count is 46 grains.

Q. 141. According to your best judgment that was spotted in the year 1830?

A. Yes.

Q. 142. There is a chip marked "cut near the pond brook"; what is the pond brook?

A. That is the Nancy pond brook.

Q. 143. Up within a mile and a half of the north line?

A. Yes.

92 Q. 144. How many grains did you find in that piece?

A. I called it 46 grains.

Q. 145. State whether you can always count the grains within a grain or two.

A. You can't a great many trees; it is bad about counting the grain; they run together; a beach tree—it is hard counting the grains on the beach.

Q. 146. How are these pieces that you have given us here?

A. I think there is no trouble in counting the grains on these.

Q. 147. These other chips, are these of the same age or younger cuttings than that?

A. That is a birch; it is difficult count' the grains on that. I judge it to be of the same age, although for several years past that tree
93 grew very slowly and the grains are very fine. It is hard to determine the number of grains there for half an inch, but I judge that to be of the same age as the other.

Q. 148. Where was that cut?

A. 340 rods from the Albany corner. It is difficult counting the grains on that. I think, though, by taking a plane and then oiling the end, they might be counted on that, though it won't determine the full number of grains on that, for I haven't got the whole spot. I called that 46 grains. It was too much trouble to carry so much heft; the block that it is cut out of is usually a pretty heavy block.

Q. 149. Do you know where it was cut?

A. My minute says near the "2d mile tree," about two miles from the corner of Albany.

94 Q. 150. Now, did you in either of these years go on what you called the north line of Elkins grant?

A. I was there in the fall of 1875.

Q. 151. Where did you commence that line?

A. I commenced that line at the fir-tree corner and ran westerly to what I called the branch of the Pemigewassett, known as the Franconia Branch.

Q. 152. Did you come out there to the N. E. corner of Lincoln?

A. I didn't pass west of the stream; I ran over the distance that was stated in the charter, and coming to this stream I concluded not to pass it.

Q. 153. Did you find the corner?

A. I did not find the corner.

Q. 154. Did not come to it?

A. No.

95 Q. 155. Do you know how far it is from that stream?

A. Only by hearsay.

Q. 156. How far was it from the fir tree to the point where you stopped your running west?

A. My impression is it was 8 miles 132 rods.

Q. 157. To Franconia Branch?

A. Franconia Branch.

Q. 158. Did you find a marked line through?

A. We did; found a very well defined line.

Q. 159. Any indications of ranges of lots?

A. Yes; we found various trees indicating corners on that line; some of the trees marked with letters on them, initials of surveyors or owners.

Q. 160. Apparantly corners of lots?

A. I should judge so.

96 Q. 161. Upon which side of the line was it allotted apparently?

A. I judge that the corners we found would be corners of the tract above called Sargent's grant, lying north.

Q. 162. Did you at any time go east from that fir tree?

A. I did.

Q. 163. What did you find going east?

A. We found a line running east from the fir tree, extending to the road, and in fact to the Saco River.

Q. 164. Did that line stop at the road?

A. It didn't; the trees were spotted beyond the road.

Q. 165. Did you find any old marked tree near the road?

A. We found a beach tree near the road.

97 Q. 166. How old was that mark according to your judgment?

A. I should say it was marked about 1830. It might have been marked a year before or later.

Q. 167. Was that marked as a corner tree?

A. I don't so understand it. It is a marked tree standing very near the road.

Q. 168. Did you ever in your work up there, when you run out Hart's location, find any line running north and south from that tree?

A. Never did.

Q. 169. Have you ever learned any fact from your observation which would induce you to consider it as a corner tree?

A. I never have—anything that would indicate to me it was a corner tree.

Q. 170. According to your experience as a surveyor, what would that tree indicate?

A. Very often when we leave work in the woods we spot from

98 that point out to a point where we would like to take the trail in,

and I judge that to be such a line, a line to find the work left in the woods or a certain tract of land or a certain corner.

Q. 171. Is that tree near a hill that has any special name?

A. It is near a hill that I have heard recently called Tiler's Hill, but it is a new name to me. I have never known it as such till recently.

Q. 172. About how far north of the old Crawford House is that?

A. I should say in the vicinity of 2 miles, maybe some short of that.

Q. 173. How old, in your judgment, is your north line?

A. I think we made one grain more in the north line than we made in the east line. I should judge about a year older.

99 Q. 174. Have you ever seen a plan or survey of the Bean, Gilman & Meserve tract?

A. I never have.

Q. 175. Have you ever searched for such a plan?

A. I have.

Q. 176. I have applied to Willey for such a plan, supposing that he might have it.

Q. 177. What Willey?

A. James C. Willey, son of James Willey, the commissioner.

Q. 178. Where did you see him?

A. At his residence at North Conway.

Q. 179. State whether or not he had any papers of his father.

A. He had papers that he called his father's. I examined what papers he brought me as his father's papers, but found no plan of this grant.

100 Q. 180. You at one time made a search at the sec'y of state's office?

A. I have 3 or 4 times.

Q. 181. And the papers of the land office?

A. Yes; I searched for it there.

Q. 182. In whose charge are the papers of the land office?

A. In charge of the sec'y of state.

Cross-examination:

Q. 183. You live at what is called Lower Bartlett?

A. Yes.

Q. 184. That is about how distant from the birch tree you speak of on the river?

A. It is about 8 miles.

Q. 185. You have been acquainted with what is called Hart's location all your life?

A. I have.

101 Q. 186. Do you know if Hart's location has been occupied by settlers; and, if so, how long it has been so occupied?

A. It has been occupied. There have been settlers on the location ever since my remembrance.

Q. 187. Have you ever had occasion to examine the lines of any of their lots?

A. I have.

Q. 188. Whose lots have you examined?

A. I have examined what is known as the Parker lot for one. I have examined what is called the Coats lot and the Willey lot and the Lawrence lot and some others.

Q. 189. State whether these lots are marked on the land.

A. I find some indications of marking near the road, but the exterior lines up west and east were not defined on the ground.

Q. 190. What indications have you ever observed as to the
102 time these lots have been occupied by settlers. I speak of the lots generally in Hart's location?

A. I think some of them might indicate 50 years or more.

Q. 191. What is the reputation in that neighborhood as to the time that location has been settled and occupied?

A. I should say at least 60 years or more.

Q. 192. Isn't it as much as a hundred years?

A. I don't know but it may be.

Q. 193. And to what extent have settlements been occupied in Hart's location—how far north and how far south?

A. The upper settlement is about 2 miles south of the north line of Hart's location; the upper settlement is about 2 miles south of the north line.

Q. 194. South of the gate of the notch, as you call it?

A. Yes.

103 Q. 195. And the settlements extend down to Bartlett?

A. Not very near; you will find a space of some 4 miles, and then you will find inhabitants. There is quite a distance between. There are only a few inhabitants on Hart's location, perhaps 6 or 7 families.

Q. 196. I am speaking of the original of Hart's location. You say part of it has been actually annexed to Bartlett?

A. Yes.

Q. 197. Take all the original location, how largely has it been populated within your knowledge, from one end to the other of the original location?

A. I should say 6 or 7 families.

Q. 198. You mean in the whole of the original extent of Hart's location?

A. Yes.

104 Q. 199. Commencing at the beach tree which you found near the highway, which is in the line of what you call the north line of Elkins' grant, from that downwards towards Bartlett, how much has it been occupied within your knowledge?

A. I don't think I called that the line of Elkins' grant, but starting on the river from that point of the beach tree, there are 5 families, I think, south of that.

Q. 201. Has that been occupied as long as you can remember?

A. Yes.

Q. 202. Is its reputation that it has been settled a great many years?

A. Its reputation is, I think, that Crawford, old gentleman, went there first, Abel Crawford.

105 Q. 203. He died some twenty years ago?

A. I should say so.

Q. 204. And was then a man of great age?

A. Yes; he was an elderly man at his decease.

Q. 205. He occupied a part of what is called Hart's location?

A. Yes.

Q. 206. State whether or not this has been a political organization within your knowledge.

A. It has.

Q. 207. Whether representatives have gone to the general court from Hart's location.

A. I think they had two there one year.

Q. 208. You say you undertook on one occasion to survey the outlines of Hart's Location?

A. I did.

106 Q. 209. You didn't follow or attempt to follow the line laid down on the plan annexed to the grant?

A. I didn't have that plan then.

Q. 210. Then, of course, you neither followed or attempted to follow it?

A. I didn't follow it, and if I had had it I don't think I would have attempted to follow it.

Q. 211. Couldn't any good surveyor trace these lines on the earth according to that plan?

A. He couldn't trace them on the ground; tracing and making lines is quite a different thing.

Q. 212. State whether you can lay down Hart's location according to this plan annexed to the grant.

A. You can lay it down in a way any good surveyor can.

107 Q. 213. I ask whether, take this plan, you can lay it down on the earth?

A. Yes; you can lay it down on the earth. Yes; take the plan, you can do it.

Q. 214. The objection you make is, take the description in the grant and compare it with the plan?

A. Then can't any surveyor lay it down according to that plan and the charter?

Q. 215. You say you found no indications that this Hart's location had been located and surveyed before?

A. Yes.

Q 216. Did you ever see in the office of the sec'y of state a plan returned about the year 1806, of Hart's location?

A. I suppose I saw the original recently, of which that is a copy.

Q. 217. Are you familiar with the fact that the State of New

108 Hampshire, in 1803, required plans to be made of the towns and places in the State?

A. I am.

Q. 218. Had you at the time you made your survey seen any such plan made of Hart's location?

A. I had not.

Q. 219. Have you seen any such plan?

A. I have seen the original, of which I suppose that is a copy.

Q. 220. This is a grant of 1772?

A. I suppose it is.

Q. 221. With reference to the plan made in 1803; have you seen such a plan as that made by the political authorities of the location, the selectmen, or whoever were acting as such, and returned to the office of sec'y of state between 1803–1807?

109 A. I think I saw a plan in the sec'y of state's office purporting to be made by Merrill.

Q. 222. State whether in your survey of Hart's location you made any attempt to follow Merrill's plan.

A. I did not. I made that survey without any reference to any plan.

Q. 223. You are acquainted with Dr. Bemis?

A. Yes.

Q. 224. Say whether or not you saw in his possession any plan of Hart's location?

A. I can't say whether it was an original plan or not. I saw a plan in his possession.

Q. 225. It was an ancient plan, was it?
A. It was.
Q. 226. Do you recollect who made it?
A. I think it was by Merrill. No—it was by—I don't recollect the name.
110 Q. 227. Have you seen any plan on which the lines of the township have been laid down?
A. I have; it was this plan.
Q. 228. You made no attempt to run by any plan?
A. I surveyed the tract of land, as I said before, so as to lay it down on the land in the best shape.
Q. 229. Best shape for who?
A. For all parties.
Q. 230. You made the survey at the request of Dr. Bemis?
A. Yes.
Q. 231. And he claimed to own the location?
A. Yes.
Q. 232. You say you went up to what is called the gate of the notch, which you describe as near the Crawford House?
A. Yes.
111 Q. 233. Do you know there is another place which is sometimes called the narrowest place or gate of the notch?
A. No, sir; I don't, of any other place. There are some narrow places in passing through the mountains, but I never heard any of these places called the gate of the notch.
Q. 234. Was there no other passage which is as narrow or more narrow than the one you call the gate of the notch?
A. I don't think there is; I think the place we call the gate of the notch was originally 18 feet wide for the road and river, and since then the ledge has tumbled down some.
Q. 235. State whether below that there is another narrow place.
A. There is.
Q. 236. How far down is that?
A. Some ¾ of a mile, and perhaps more.
112 Q. 237. You say you know Elkins' grant. What acquaintance had you with that grant except going on it in 1875 or '6.
A. That is the first that I have been on the tract to make a survey. I have known of the tract a good many years.
Q. 238. You have known of the land as being there?
A. Yes; I have been on the land, but not to make a survey till that time.
Q. 239. Your first acquaintance with what you call the east line, north and south, was in 1875?
A. I think it was.
Q. 240. You say you became acquainted with what you call the N. W. corner of Albany how many years ago?
A. I think 30 years ago.
Q. 241. Was that on the occasion of a dispute as to where the N. W. corner was?
113 A. It was.
Q. 242. That dispute was between the towns of Burton and Bartlett.
A. Yes; Albany and Bartlett.
Q. 243. Which party showed you this corner as the corner.
A. It was the authorities of Albany.

Q. 244. Did the authorities of Bartlett ever undertake to show you where the corner of Bartlett was?

A. I was there as one for the town, or those in the suit.

Q. 245. Where did they claim that the corner was?

A. The question between Bartlett and Albany was as to the corner, as located on the ground, and the charter corner.

Q. 246. Where was that corner?

A. It was about a mile below there?

Q. 247. Further south.

114 A. Yes; they claimed the corner according to the charter of Albany, which was chartered under the name of Burton, commenced at the center of the west side line of Conway, and run due west to Sandwich, or the addition of Sandwich. To run the line according to the charter would remove the corner down some over a mile, but the line laid on the ground by the authorities of Burton carries the corner up where it is now; that is the only corner that was ever shown on the ground.

Q. 248. Did you make a mark on the hemlock tree at that time?

A. I did not.

Q. 249. Can you recollect what were the marks on it?

A. I cannot.

Q. 250. It was marked as a corner tree?

A. It was.

115 Q. 251. Can you tell on how many sides it was marked?

A. On three sides at that time; I am not sure that it was on the west side; it was marked on the north side, on the east side, and on the south side.

Q. 252. You began to run a line from that place in June, 1875, in a northerly direction at whose request?

A. At the request of the Bartlett Land & Lumber Co. Their agent and treasurer, Mr. Jose, employed me to run.

Q. 253. You say you proceeded some 50 or 100 rods before you found any marking?

A. We found marks, but before we found the old line it was something like that distance.

Q. 254. What were these other marks that you found?

A. There was a good deal of spotting in the vicinity of that corner; there had been a good many lines run into that corner, and from

116 most every point; finding so many lines, I paid very little regard to any of them only just to take their bearing, and when I got up some ½ mile I examined for the old line, found the line a little to the east; I hadn't made variation enough.

Q. 255. Somewhere on that line you cut a chip out an old marking and found how many grains?

A. What I cut in 1875 I found 45 grains; those I cut in 1876 I found 46 grains.

Q. 256. Have you had any occasion to change your mind in regard to the number of grains which you found?

A. I don't know that I have.

Q. 257. Did you testify in this dispute at some earlier period before one of the judges of the State court?

A. I think I have testified in regard to this matter.

117 Q. 258. Before Judge Smith, was it?

A. Yes.

Q. 259. How long ago was that?

It might have been 2 years ago.

Q. 260. Do you recollect what was your opinion then and your testimony as to the number of grains you found in this oldest line going north from Burton?

A. I think it is about the same I have given here.

Q. 261. I call your attention to the fact whether it wasn't 44 instead of 45?

A. I might have said 44 or 45; I find some grains with 44, I find some with 43, I find some with 45. It is difficult to tell as to the grain. If I said 44 a year ago, I said what was right.

Q. 262. Said what you believed then no doubt?

118 A. Yes.

Q. 263. Was your testimony on that occasion substantially this: That you tried your line at several places and found 44 grains?

A. That might have been, but I have no recollection now; I might have said 44, I might have said 45.

Q. 264. How frequently did you find trees marked, before you got to Sawyer's River?

A. Quite frequently.

Q. 265. What do you mean by quite frequently?

A. Sometimes we would find them every 4 or 5 rods, sometimes would go 20 rods and find no trees between.

Q. 266. In going north towards Sawyer's River you found what seemed to be the lines of lots running west from this line?

A. Yes; we found some lines running west from this line.

119 Q. 267. How were they indicated?

A. These westerly lines started off apparently from this line at right angles.

Q. 268. Did you trace any of them?

A. I did not; took the bearing of 2 or 3.

Q. 269. How were they marked at the line you were running?

A. Corners marked.

Q. 270. How did these lot lines correspond with the age of the line running north?

I don't think they were so old; I didn't test them; I saw some dates on some of these trees; I think I found 1867 on one tree, 1868 on another tree, and found surveyors, marks on some of these trees; I mean a character that a surveyor puts on, indicating that a survey has been made; some put on a square & compass, some change that into other marks.

120 Q. 271. What was the age of the lot lines?

A. I didn't test the age of the lot lines.

Q. 272. Were they quite recently or quite old?

A. I think many of them were quite recently. I think some that I saw might have been a dozen years old. I think some might have been since then.

Q. 273. You said this line continued to be well marked up how far?

A. This east line run a straight line and very good line from the hemlock tree 3 miles and 65 rods.

Q. 274. That carries you to what point?

A. About ¼ of a mile north of Sawyer's River. At the angle we found some difficulty in tracing the line.

Q. 275. I understand you to say, after going a little distance, you found a well-marked line?

121 A. Yes.

Q. 276. Did you test the age of that line?

A. I did.

Q. 277. How did the age of that part of the line compare with the lower part?

A. It was the same age up to Nancy's Brook.

Q. 278. How was it from Nancy's Brook on?

A. From Nancy's Brook on to this fir tree we found the line very well defined, but I didn't find any spots as old as south of that.

Q. 279. How much was the age then?

A. I think the oldest spotting that I found was some 27 or '8 years.

Q. 280. Were they uniform in age?

A. I didn't try much along there.

122 Q. 281. In tracing this northerly and southerly line you found marks of a second survey?

A. Yes.

Q. 282. Did you test the age of that 2d survey?

A. I did.

Q. 283. When was that made?

A. My impression is I called it renewed about 1850.

Q. 284. How far did the line of 1850 extend north?

A. I think the line was renewed the whole length.

Q. 285. Is your recollection clear on that point?

A. I think it is.

Q. 286. Do you know who made that line?

I don't, only by hearsay.

Q. 287. State whether there were any marks which you can de-

123 scribe as characteristic of that line or marking.

A. I don't know as I can state; I saw the initials of some men that acted in the capacity of surveyor.

Q. 288. Do you recollect what the initials were?

I think I saw "J. C." on one or 2 trees, & I am not sure of any date.

Q. 289. Going beyond or north of Nancy's Brook, did you find any of these marks north of that?

A. I did not; nor did I find any indications of any corners after I got to Sawyer's River.

Q. 290. I was going to ask you that question; how far north you found indications of lot corners?

A. Up to very near Sawyer's River?

Q. 291. And not beyond?

A. And not beyond.

Q. 292. On either side?

124 A. On either side.

Q. 293. I understand you to say, in answer to a question proposed by the plaintiff's counsel, that Elkins' grant lies on the western watershed, towards the Pemigewassett?

A. Yes.

Q. 294. Where does the Sawyer's River rise?

A. It comes from Bean, Gilman & Meserve purchase.

Q. 295. Doesn't Sawyer's River drain a considerable portion of Elkins grant?

A. Yes.

Q. 296. And into the Saco?

Yes.

Q. 297. Then it was at the northern extremity that you find the summit?

A. Yes.

125 Q. 298. You cut out the chips and counted the grains to test the age.

A. Yes. If you cut out the chip after the saliva hardens you have a grain.

Q. 299. State whether it had formed before you cut it out.

Some trees you can tell, and some you can't.

Q. 300. How was the fact as to there having been any grain that had formed the year you cut it out?

A. I should not want to testify as to a year.

Q. 301. You traced the north line over to the branch of the Pemigewassett?

A. Yes.

Q. 302. Describe how you obtained your distance. In the first place, what sort of a country was it to travel over?

A. It was a pretty rough country to travel over; pretty rough country to survey.

126 Q. 303. This line running east and west, the north line of Elkins' grant, isn't it mountainous?

A. Yes.

Q. 304. Don't you cross over many steep mountains?

A. Yes, sir; you pass over some pretty rough country.

Q. 305. Describe what course you took to ascertain the distance. How did you manage your chain in order to get the distance?

A. The distance was 8 miles 132 rods.

Q. 306. State whether that indicates the distance on the surface of the earth or whether it indicates some other line.

A. We made that survey simply as we make all surveys. We intend to level the chain, though there must be a good deal of judgment in measuring land in that way, but the mode of measuring is to make such a measuring on the surface of the ground as would make your

127 measurement the same as if it was all level?

Q. 307. When you say 8 miles & a fraction, you undertook to get a line which was level?

A. Yes.

Q. 308. Wasn't, in fact, that country so steep that it was impossible to do more than approximate to a horizontal line?

A. That is about all you can do in anything with instruments.

Q. 309. Isn't it more difficult to get a horizontal line in a steep country than in a country that is level?

A. Yes; it requires care and good judgment to measure in a country that is rough.

Q. 310. Who made the allowance, you or the chairman?

A. The chairman.

Q. 311. Could you in all places hold your chain in a horizontal position?

Where we found a place that was to' steep to level, we generally

128 have to make allowances, which is done by experienced chainmen. They can generally level very closely. There is some judgment as to how much to be allowed.

Q. 312. Did you use any instrument to make the level?

A. No.

Q. 313. The country was a wooded country?

A. Yes.

Q. 314. Rough, with rocks and ledges?

A. Yes.

Q. 315. Swamps and the like?

A. Yes.

Q. 316. Isn't it, in fact, difficult to get anything like a nearly accurate result as to distance on such a line?

A. You can approximate in such a survey very closely to a
129 correct result. You can't get a survey made in that way correct. You must approximate with instruments in most any business.

Q. 317. In running this northern line you found marks of lots laid out on the north side of the line?

A. We did.

Q. 318. As a part of Jacob Sargent's grant?

A. Yes; I infer the corners were made for that tract by the spotting.

Q. 319. How large a part of that line did you trace these corners?

A. In the west part I should say nearly one-half of the distance. At the easterly part we found some marked trees; I have a record of them; I could tell how many I found and the marks on them.

130 Q. 320. State whether in tracing that line you found that Sargent's grant appeared to have been lotted out the whole length of the line you run?

A. I did not find corners the whole length of that line.

Q. 321. Did you look to see whether on the south side of that line in Elkins' grant ranges of lots had been run out?

A. I don't think we did.

Q. 322. Did you search for that?

A. I looked at the trees that we found marked, and I found spotting on the trees on the east, north, and west, which would indicate a corner on the north tract.

Q. 323. Are you prepared to say that range lines had not been laid out on that line in Elkins' grant?

A. I am prepared to say I didn't find them.

131 Q. 324. From the fir tree you found a line extending in the same direction down to the turnpike?

A. No, sir, it isn't parallel with the north line; there is an angle there.

Q. 325. How much of an angle?

A. Some 3 degrees.

Q. 326. Which way?

A. To the south.

Q. 327. You traced it down to the beach tree near the road?

A. We traced it down to the turnpike, and there was a tree spotted at the turnpike, and a tree spotted on the east side.

Q. 328. How far is the river from the turnpike at that point?

A. Some 7 or 8 rods.

132 Q. 329. The beach tree is found near the turnpike; what marks did you find on it?

A. I tried that beach tree also; I took a record of what I found on the tree, & I had rather refer to my minutes as to what I found; I don't know as I can recollect distinctly what I found there. (Witness refers to his minutes.) "J. S.—C. W.—G. W. H."

Q. 330. Anything else?

A. I have not anything else in this record.

Q. 331. How many marks were spotted on that tree?

A. There were several spots on the tree.

Q. 332. Describe how they were situated.

A. I am not sure but it was spotted all round.

Q. 333. Were they not spotted as a corner bound?

A. They were not as I make a corner bound.

133 Q. 334. As other surveyors make corner bounds?
A. I find corners spotted in most every shape.
Q. 335. Didn't the spotting on that indicate that it was intended as a corner for something?
A. No; I should say not, because I examined east of the road, and I found the line extended. I was told there was a corner there, and I went specially to see.
Q. 336. Who told you?
A. I can't say now.
Q. 337. Dr. Bemis?
A. No.
Q. 338. Did you talk with Dr. Bemis on that subject?
A. Yes; but he said there was no corner there.
Q. 339. Didn't the marking indicate that it was a corner?
A. I should say not.
134 Q. 340. Didn't the marking indicate that it was something else than a trail line?
A. I took it to be a trail line to find work in the woods.
Q. 341. Could you account for so much marking on it?
A. In the first place, you would want indications to make that point coming each way, and hence you must have spots on the south side and on the north side.
Q. 342. How old were these marks on the beech tree?
A. I think that spotting was made about 1830.
Q. 343. Did you ascertain the age of the spotting on the fir tree?
A. That is a difficult tree to determine the age of the grains.
Q. 344. Do you mean the fir tree is difficult to count, or that
135 was a particularly difficult tree?
A. That tree.
Q. 345. Why?
A. The grains were fine and not regular; it was difficult to ascertain anything.
Q. 346. Did you attempt to count them?
A. I did.
Q. 347. What was the count?
A. I didn't satisfy myself, and gave the block into the hands of my brother to count.
Q. 348. How much did you make in the count?
A. I could not satisfy myself what it was.
Q. 349. How high, according to your impression?
A. My impression is I counted in the neighborhood of 30 grains, but I could not satisfy myself.
136 Q. 350. Were there more than 30 grains there?
A. I think there were.
Q. 351. *Were there more than 30 grains there?*
A. *I think there were.*
Q. 352. How many more—could you form any estimate?
A. That tree might have been spotted, according to the indication of the spotting, at the same time that the other trees were spotted.
Q. 353. Might have been?
A. Yes.
Q. 354. And might not have been?
A. Yes; I can't say, because I didn't determine the number of grains.
Q. 355. How early did you become acquainted with the Bean, Gilman & Meserve tract?
A. Since a boy I have known it.

137 Q. 356. Did you know either Bean, Gilman, or Meserve?
A. Yes; all of them.
Q. 357. Did you ever reside in the family with either of them?
A. I resided with Meserve for 3 years.
Q. 358. When was that?
A. From 1831 to 1834.
Q. 359. Have you had an interest Bean, Gilman & Mesewe purchase?
A. I had an interest in a fraction of that land for several years by the way of taxes.
Q. 360. When was that?
A. That must have been over twenty years ago that I bid it off for taxes, & held it in my hands for several years, & then conveyed it to the original owner.
138 Q. 361. Can you tell how many acres in that purchase, as you described it in your plan?
A. I have never computed it.
Q. 362. Can you compute it?
A. I don't think I could accurately, from the fact that there are several tracts that never have been surveyed out.
Q. 363. Can you give a general estimate?
A. I should not want to give one unless I could give one somewhere near.
Q. 364. Are there there more or less than 20,000 acres?
A. I don't want to say. It is very irregular, and there the line of Albany is very crooked, & it chops into the grant considerably the way the line is established, & I have not computed it for that reason.
Q. 365. Who was the person who first called your attention to
139 the line which runs north from the corner of Albany?
A. I think I had some knowledge of that line when I was a boy. I was knowing to the parties who purchased this land, coming on there and making an examination of this tract.
Q. 366. And by those parties you mean who?
A. Meserve and Bean.
Q. 367. Did you go with them?
I did not. I had supposed from that fact there was a line.
Q. 368. Who called your attention to it first?
A. I think when I was applied to to run that line I then stated that I supposed there was a line dividing these grants.
Q. 369. These other marks that occurred in various places, are you able to fix their dates?
140 A. I found the date of 1867, 1868, 1851, & 184—something; I could tell by my minutes.
Q. 370. Can you indicate where these marks were?
A. There are 2 or 3 dates at the hemlock tree, and then about 200 or some odd rods another date on a tree.
Q. 371. What was that?
A. I think it was 1867; I think it was a beech tree; and then some 200 rods from that we found another beech tree marked as a corner, with stake and stones near by.
Q. 372. Where was that?
A. Some 400 rods or more from the hemlock tree, I think.
Q. 373. What year was it marked?
A. I think 1867. There was a stake and stones near by one of these trees.
141 Q. 374. Are you able to give any further account of these trees?

A. Not without referring to my minutes.
Q. 375. Refer to them.
A. My minutes say 170 rods from the corner to a beech marked, it was "1. R.," the letters "C. R. S.," & near this a stake & stones.
Q. 376. Are you able to tell the age of the marking?
A. I am not.
Q. 377. State whether you made any estimate of the age.
A. My minutes don't show it. I made further examination in 1876 of the same line.
Q. 378. What did you find in 1876 as to the same point?
A. I have a minute at the hemlock tree of survey mark & the letters "J. C., 1868," and then the letters "C. G.—M. C. W."
142 Q. 379. What next?
A. The minute of the tree I have just given.
Q. 380. What next?
A. Beech marked as corner on the west "286 R.," then under that a letter "A," and a beech to the west of this tree with letters "C. R. S., 1873."
Q. 381. How far was that west?
A. 10 or 12 feet my minutes say.
Q. 382. Was that modern marking apparently?
A. Yes.
Q. 383. These are all the corners you found on the east line?
A. Yes. With lines running from them.
Q. 384. Have you any other that lines did not run from?
143 A. I don't see any other that are noted; I found 2 that were marked as corners.
Q. 384. In 1876 did you take any observation of the 2d corner above the hemlock?
A. I did.
Q. 385. Was there a change then?
A. I didn't notice anything else different from what I noticed in 1875.
Q. 386. Make any additional observation?
A. No; only so far as this in 1875. I didn't cut out blocks; I merely cut into the tree & counted from the tree, & I find that I noted the number of grains 44 in 1875; and in answer to the question whether I did so testify before Judge Smith, I probably did because I find my minutes so. In 1876 I retraced this line and made a thorough examination, & on inspecting these blocks, which can be counted much
144 better then when they are in the tree, I counted 46 grains.
Q. 387. When did you testify before Judge Smith?
A. I think in the winter of 1876.
Q. 388. 1875–'6 or 1876–'7?
A. 1875–'6; that is my opinion.
Q. 389. Did you, at the same time, testify before Judge Smith that your first acquaintance with that line was in 1875?
Perhaps I did that was the first time I was on it.
Q. 390. Did you testify then that was the first you knew of the line?
A. It was the first I knew of it personally.
Q. 391. What survey had you knowledge of?
A. The survey by Willey.
Q. 392. When?
145 A. The first of his active life in surveying.
Q. 393. That dated from what year to what year?
A. From 1825 up to 1840. I have surveyed over a good many of his old lines before I traced this line.

Direct examination resumed:

Q. 394. This plan of 1772 of Hart's location, look at that and see if there is a scale upon it?

A. Yes.

Q. 395. Just look and see, with your rule or anything, and see if that scale gives, substantially, the same length of lines that was given in the grant itself?

A. This scale perports to be 100 rods to the inch. The distance stated in the charter would be 2,185 rods. & the distance then
146 named is about the distance according to this scale on the plan.

Q. 396. I understood you to say this morning that that plan, independent of the description in the charter, could be located on the ground between the Vere Royce location and the notch. At that time had you noticed that scale?

A. I don't understand that I answered in that way. I presume that I answered that it could be laid down as far as it went. With the courses so indefinite as they were, the river might be kept within the tract, but the distance that is laid down there according to that scale would not give the tract more than half the distance to the notch. That scale there would represent not quite 7 miles & the distance would be over 13 miles.

147 Q. 397. I ask you the question as a surveyor—with that scale and that plan, could it be applied even approximately so as to extend from the Vere Royce location to the narrow part of the notch?

A. It could not.

Q. 398. Do these settlements extend up on the side of the valley?

A. They do not; they are in the valley.

Q. 399. How near the river?

A. Very near the river.

Q. 400. Any of the enclosed lands extend to the limits of Hart's location as you have mapped it on the plans?

A. They do not.

Q. 401. How near is the nearest settlement to the beech tree?

A. The Crawford place, where Dr. Bemis lives, which is about two miles from it.

148 Q. 402. Any enclosed land further north?

The farm (Dr. Bemis' farm).

Q. 403. How much further does that extend north?

A. About ¾ of a mile; perhaps a little more.

Q. 404. Anything any nearer the beech tree than that?

A. Nothing.

Q. 405. You say there is a narrow place below the gate of the notch of the White Mountains; how wide is that, as compared with the gate of the notch?

A. It is quite wide between the ledges, but the road is quite narrow around the bend of the river; but the ledges don't curve together within a good many feet so near as at *at* gate of the notch.

Q. 406. State whether or not the gate is the narrowest part of the notch.

A. It is.

149 Q. 407. I understand there was some question about the corner of Albany; was there any question whether it was further south or north than the hemlock tree, or whether it was further east or west?

A. It was a question whether it was not to' far north. The men interested on one side claimed to the charter line, rather than any line that had been run and located on the ground. The line was uncertain.

I could find no line marked on the ground as the charter line. The question was whether they should hold to the charter line, or whether they should hold to the line located on the ground.

Q. 408. The question was in the west line of the town of Albany, and one corner would be north of the other.

A. The question wasn't between the lines on the ground; it
150 was between the line on the ground and the charter line.

Q. 409. What, in your opinion, was the age of the fir tree on the north line?

A. That would be difficult to answer; it might be a very ancient tree. You can't judge upon the age of a tree by its size; some trees may be very small, yet old.

Q. 410. What was the size of it?

I should say about 10 inches through; it might have been a hundred years old, it might have been 75, it might have been 125.

Q. 411. Was it on a ridge?

A. It was on a spur of the ridge.

Q. 412. Growth full or stunted there?

A. Stunted.

Q. 413. Somewhere I think you have said you have made sur-
151 veys of lands near the Bean, Gilman & Meserve tract?

A. Yes; on the north & east of it.

Q. 414. On the Bartlett land?

A. Yes.

Q. 415. Did you make any surveys within the limits of this tract of Thomas Hanson?

A. I have a good many years ago, nearly 30 years ago, when he first came up, between him and the settlers on the other side.

Cross-examination resumed:

Q. 416. Wasn't the corner of Albany further west than the charter line required?

A. No, sir; it was further north.

Q. 417. Do you recollect how far it was from the Conway line?

A. In the vicinity of 12 miles.

152 Q. 418. Wasn't that considerable more than the charter required?

A. The charter, I think, extends that line to the corner of Sandwich, or an addition granted to Sandwich. The old town of Sandwich was laid out first, and then an addition to Sandwich, Sandwich running 2 miles, and Albany then was to run to the corner of the addition made to Sandwich.

Witness recalled by pl'ff:

Q. 419. Did you go out on the line with Mr. Rogers and Mark Pierce?

A. I did.

Q. 420. State whether or not you went out on the same line you have described to the jury as the east line of Elkins' grant?

A. I showed Rogers & Pierce the same line.

Cross-examination:

153 Q. 421. What did you do with the chips at the fir tree?

A. I have them. (Witness produces them.) I cut them out on the west & south sides.

Q. 422. How many sides was the fir tree spotted on?

A. My recollection isn't distinct whether it was 3 or 4 sides.

Q. 423. Did you take from the tree more marks?

A. When I was there first I was not calculating to disturb them; when I was there last I found the tree blown over and shivered a good deal.

Q. 424. Did you cut out any chips so as to ascertain the age of the marking on that tree?

A. I did cut out a chip, so as to tell the exact age; it was dark, & I could not count well, so I gave it to my brother.

Q. 425. What did he do with it?

154 A. I don't know what he did with it. I didn't preserve any chips. I don't know what he did with it.

Q. 426. When were these cut out—in 1876?

A. It might have been in 1875, but my impression is it was 1876.

Q. 427. What is that pencil mark for?

A. It means that these two go together,

Q. 428. So really there are but two markings cut?

A. Two markings.

155 JOSEPH PITMAN, being sworn, testified

Q. 1. Where do you reside?

A. In Lower Bartlett.

Q. 2. What has been your occupation?

A. Farmer part of the time, and part of the time surveyor.

Q. 3. Are you a brother of Judge Pitman, who has been on the stand?

A. I am.

Q. 4. Were you with him upon this line which runs north from the corner of Albany?

A. I was.

Q. 5. Describe briefly what you found there.

A. The first time I was there we went up to Sawyer's River; then I was with him again, and we traced the line from the N. W. cor-

156 ner of Albany through to the north line of Elkins' grant.

Q. 6. Where did you come out on that line?

A. Very near the height of land making up from the Saco on the east and Pemigewassett on the west.

Q. 7. Did you find anything to mark the spot?

A. A fir tree marked as a corner.

Q. 8. From your experience as a surveyor, what should you judge was the age of the line you followed?

A. The first time we went over it I think we made no examination as regards the age the first time. We made an examination as to the corner so as to start; that is, we didn't take chips out of the trees.

Q. 6. Did you afterwards take out chips?

157 A. We did in 1876 when we traced it over again. I think in September, 1876, we made 46 grains. I supposed the line was all of that same age to within a mile & a half of the north line.

Q. 10. For that 1½ miles how old were the spottings?

A. I think that was probably run in 1850.

Q. 11. Did you see any indications of more than two runnings on the lower part of the line?

A. I think part of the way it had been run and respotted over twice.

Q. 12. About what time was the first respotting, according to your best judgment?

I think I counted some 38 grains at that time on the 2d spotting.

Q. 13. Were there any witnesses about the fir tree?

A. There were two trees I think marked as witnesses. When

158 we first found this corner I cut out chips (the tree hadn't been cut into at that time) and I counted the best I could; cut the chips out of the fir corner.

Q. 14. In 1875?

A. Yes.

Q. 15. Did you decide how old this chip was?

A. It was a very difficult tree to count; the growth had been slow. I made out what I called at that time 38 grains on the corner. I am not positive there were 38 grains; that was as near as I could make it.

Q. 16. May have been more or less than 38?

A. Yes; but it is my impression there might have been more instead of less.

Q. 17. On this north & south line did you find any indication
159 of an allotment on either side?

A. My impression is that we found one or two corners down near the Albany line; I won't state positive.

Q. 18. On which side?

A. On the west.

Q. 19. Did you see any signs of an allotment on the east side?

A. I did not; I also run the north line towards Lincoln.

Q. 20. Did you find the corner of Lincoln?

A. No, sir; we stopped at the Franconia branch of the Pemigewassett.

Cross-examination:

Q. 21. Did you preserve any chips on these surveys?

160 A. My brother & Mr. Alonzo Smith took charge of the chips. I assisted in taking them out and counting.

Q. 22. I mean particularly the chips of the fir tree.

A. No, sir; I didn't.

Q. 23. Who was present when you took out the chips from the fir tree?

A. My brother, I think, and a man by the name of Nute, & it strikes me a man by the name Sinclair.

Q. 24. Did anybody else undertake to count them besides yourself?

A. My brother tried to count them a number of times and he could not exactly satisfy himself & he requested me to count; so I did.

Q. 25. This was when?

A. 1875.

161 Q. 26. Were you making this survey at the request of the plaintiff in this case?

A. I was employed by my brother to go, in the interest of the plaintiff, as I understood it.

Q. 27. Why didn't you preserve your chips?

A. I had not charge of the survey, and I wasn't requested to.

Q. 28. You have had some experience as a surveyor?

A. Some.

Q. 29. What do you say to the possibility of being at all accurate in the age of a line by examination of the chips?

A. You can't always tell.

Q. 30. Within what limits?

A. There are growths so very slow that it is most impossible to
162 tell; for instance, from this fir balsam south, where the line was made of more recent date, there were many of the trees that hadn't healed over, the growth was so slow; it was impossible to tell the age of a great many.

Q. 31. Isn't there difficulty in a healthy tree?

A. Not in a healthy tree, if it is spotted early in the spring. It will commence to form a grain the first year after the spotting. If the tree is spotted in the fall of the year the grain will begin to form in the spring. It will commence at each edge and close up very short space the first year.

Q. 32. Now, in running these lines with your brother you found a line that seemed to have been re-marked how many times?

A. I think twice a proportion of the way.

163 Q. 33. That made three times?

A. Yes.

Q. 34. Was there anything in these marks by which you could tell by whom the marks were made?

A. I didn't take any particular notice till we came to the balsam tree; I noticed some marks on that.

Q. 35. Do you recollect them?

A. I recollect "I. C.," or "J. C." on one side, & I couldn't exactly decipher out the other; it might have been "K. I. N." or "K, III;" I thought it might have been put for "Elkins."

Q. 36. Or Wilkins?

A. It might have been.

Q. 37. Do you know Joshua Chapman?

A. Yes.

164 Q. 38. Where did he live?

A. On the north or west side of the mountains.

Q. 39. Did you know anything about Willey, land commissioner, making marks of that character?

A. I have traced some of Willey's marks at some time; I don't know as I know them.

Q. 40. You know a surveyor, Jonathan Cummings?

A. I have heard of him.

Q. 41. Is he alive or dead?

A. Dead.

Re-examination:

Q. 42. Did you preserve any chips in 1875?

165 A. No, sir, I didn't; I think the chips were taken out in 1876; I think we commenced the survey September 18, 1876.

166 PHILIP C. WILKINS testifies:

Reside in Littleton; age, 75; have practiced surveying over 50 years.

Q. Did you at any time ever run any part of a line which you supposed was the east line of Elkins' grant?

A. I run a line there, the east line of Elkins' grant; when I commenced running it I supposed I was running the east line of Elkins' grant.

Q. When was that?

A. 1850.

Q. At whose request?

A. I suppose that Norcross was owner, and Sam'l H. Walker acted as his agent, and he employed me, and went with me; I never saw Norcross till after the survey.

Q. Was Norcross one of the owners of Elkins' grant?

167 A. He was, and Walker acted as his agent.

Q. And he went with you?

A. Yes.
Q. Where did you commence?
A. At the southeasterly part of the grant; near the southeasterly part.
Q. What did you find near the southeast corner?
A. If you call the southeast corner down by Albany, I commenced at the hemlock.
Q. What sort of a hemlock was it? Can you describe it?
A. It was a hemlock; I should think it was over two feet in diameter, and was a green tree at that time, if I recollect right.
Q. Was it marked at all?
A. There were a good many marks on it.
Q. What did the marks on it indicate to you, as a practical surveyor?
168 A. It was shown to me as a town corner, and from the marks on it, I presume it was.
Q. Who showed it to you as a corner?
A. A man by the name of Church and a man by the name of Greeley, who lived in Waterville, and a Mr. Shackford, of Albany; Sam'l Walker was also with me.
Q. Is Mr. Walker dead?
A. I am so informed.
Q. Did he say anything to you about that hemlock tree?
A. Probably he did; I don't know as I can recollect now.
Q. Did you run in a northerly direction from that hemlock tree?
A. I did.
Q. Did you find any trace of any previous running?
A. There was a line from the hemlock, quite a distance; I
169 am now speaking, not from recollection, but from what I saw in my memorandum book, that there was a line running from there to Sawyer's River, and then that line had been run and re-marked, and extending further on to the north.
Q. How old, according to your judgment, was that line?
A. I should not want to give you any opinion about it, for I did not cut out any blocks.
Q. You found a line up to within about two miles of the north line of Elkins' grant?
A. Yes.
Q. Say whether or not you continued through on the same course?
A. I intended to.
Q. Was Walker with you all the time?
A. He was.
170 Q. You run through how far?
A. To the north line of Elkins' grant, or what he pointed out to be the north line.
Q. Walker pointed out the north line?
A. Yes.
Q. What was the general course of that line?
A. It was very nearly north. I made some variation, the variation of the compass; from the time the grant was granted it was very nearly a north course.
Q. Did it differ from a northerly line any more than the variation of the compass?
A. I presume all the difference was the variation of the compass. It is a very difficult matter to tell.
Q. When you came out on the north line, do you recollect what kind of trees you found on the north line?

171 A. I think that the general growth, where I came out was balsam.

Q. Did you mark any tree up there?

A. I did.

Q. What kind of a tree did you mark?

A. I think I marked a balsam; I think I marked two balsams.

Q. Do you know about how far that tree was west of the Saco River?

A. I think it was somewhere about two miles, more or less; not a great deal of difference from two miles from the Saco River.

Cross examination:

Q. Have you any minutes or memoranda that will enable you to give any more definite statement?

A. Yes.

Q. Will you bring them?

172 A. Yes.

Q. On this occasion of your visiting Elkins' grant in 1850, how much of a survey did you make?

A. I went clear around the whole grant.

Q. Where did you commence?

A. Down on the Thornton line of Elkins' grant, then proceeded up Raymond's grant till I came to the line of Waterville, and then went through to Albany.

Q. Northwest corner of Albany?

A. Yes.

Q. From there you ran in a northerly direction, as I understood you?

A. Yes.

Q. Describe particularly what lines you found, if any, on leaving the N. W. corner of Albany, the hemlock tree.

173 A. I found a line to Sawyer's River and that line had been marked.

Q. This oldest line that had been marked, how far could you trace it?

A. To Sawyer's River.

Q. Could you trace it beyond?

A. I don't recollect that I did; I don't know the I searched very thoroughly for it.

Q. About how much difference was there between the oldest line and the re-marking?

A. I have no means of telling, only just as I looked at the trees. I did not cut out any grains, and it was so long ago I can't answer that. I think it might be 5, 6, or 8 years; it might be 9, I can't tell as to that.

Q. State the names of all the persons that were with you.

174 A. Sam'l Walker and a man by the name of Bowen; I think his name was Chas. Bowen, and Joshua Chapman.

Q. State whether you made measurements on this line.

A. I measured the distance and took the course.

Q. State the distance. Beginning where?

Q. Beginning at the N. W. corner of Albany, the hemlock tree.

A. Beginning at the hemlock tree, and thence to a spruce tree, 320 rods. I only make two miles and 284 rods to Sawyer's River.

Q. What is the distance from Pond Brook to Sawyer's River?

A. As I run it over, about 5 miles.

Five miles from the northwest corner of Albany?

75 A. Yes.

Q. State whether or not you run a line beyond.

A. I continued my line right on to the north corner of Elkins' grant.

Q. You re-marked the old line from the hemlock tree?

A. I kept on re-marking the old line, and when I came to the new line I re-marked some trees on the new line.

Q. Beyond the Pond Brook you found no line?

A. It says thence 40 rods to the Pond Brook; here the line stopped (the witness' minutes).

Q. When you arrived at the north line of Elkins did you make any corner?

A. I marked a balsam; marked two.

Q. Was any mark on that balsam which you marked before you marked it?

176 A. On one (side.) I should say there was not on the other. I am not certain whether I marked a line tree in the north line or not; it might be a line tree.

Q. Was there any other mark on it?

A. Not that I have any memorandum of.

Q. No tree marked as a corner?

A. Not that I saw.

Q. You did mark a tree there—a fir tree?

A. I did mark a fir tree. Had a marking iron and marked a fir tree "Elkins," and then marked another one "E. and S." (Elkins and Sargent).

Q. Where did you go to after going up to that fir tree.

177 A. We started to run back, and did run back, to the river.

Q. You run down to Saco River?

A. Yes, or to the turnpike; I don't know, as we ran clear to the river that night.

Q. What did you find at Saco River?

A. We found a few rods from the turnpike, perhaps 20 rods from Saco River, a beach tree marked.

Q. As what?

A. I don't know what the surveyor's intention was in marking it; it might be a corner or as a terminus of the line; it might be either purpose. There was a good many marks on it; some letters and figures on the tree; it was marked up very conspicuously, so you could see it several rods.

Q. Give an account of what there was on it.

178 A. I can't; I recollect of taking out marking irons and putting "P. W." on it at that time.

Q. Do you remember what was on the tree at that time?

A. I don't remember the initials; there were a good many marks on it, and some letters and some figures; I can't tell what they were.

Q. Did you understand from Mr. Walker that his idea in regard to what the east line of Elkins' grant was that it corresponded with the west line of Hart's location?

A. When I was up at Albany—starting from Albany—(I won't undertake to quote, it is so long ago, what language Walker used); but Church told me positive that the line north would strike the turnpike; Walker was present.

179 Q. Did, or not, you have the description of Elkins' grant with you?

A. I did.

Q. Did you, or didn't you, understand that you were running to answer the description in that grant?

A. I did; that is all the guide I had.

Q. State whether, when you left the N. W. corner of Albany, you expected at the termination to strike the west line of Hart's location?

A. I certainly did; that is the language of the grant.

Q. Did you, or not, find that it didn't?

A. I rather concluded it didn't. When I struck the north line of Elkins' grant, I didn't know whether that was Hart's location or not.

Q. You then run out to the turnpike, did you?

A. Yes.

180 Q. Run out east?

A. Yes.

Q. State what further survey you made north to that east line, if any.

A. I went there on the north line to Franconia corner, and went around home to Littleton. It might have been a week, and it might not have been so long as that, before Walker came again, and I went down with him to establish the northeast corner of Elkins' grant; I went down for that purpose.

Q. With whom did you undertake to establish it?

A. I went down with Walker, Chapman, and Bowen; called on Davis, who professed to own one-half of Hart's location.

Q. State, if you did anything, what you did.

A. Went down with Walker, and we began at the river and measured off 235 rods.

181 Q. State whether any arrangement was made with Davis.

A. Davis went with us.

Q. What did Davis claim at that time in regard to Hart's location?

A. He claimed he was joint owner of one half (½) of it. He said that the boundaries of Hart's location had never been located, and there wasn't any line there; that the line of Hart's location had never been run; that he could not tell anything about where the line was.

Q. Where did he claim that it should be located?

A. We came to the conclusion that it was 470 rods wide, and that the general course of the Saco River was the middle boundary of Hart's location, and that we should run a line (along the) course of the river that should measure off 235 rods on each side.

Q. Did Davis acquiesce in that?

182 A. He came and went with us, and when we got to the pine tree he assisted in putting up the corner.

Q. Did you run 235 rods west of the river, or from this beech tree?

A. This beech tree is 25 rods from the river. I run 235 r'ds from the river.

Q. That is west?

A. West.

Q. Then you put up a monument?

A. Yes.

Q. For what?

A. (Reads.) "A pine corner of Elkins' grant, standing on the line of Hart's location; both parties were present, and agreed to the same."

Q. Is that your recollection?

A. That is my recollection, which I have refreshed.

183 Q. Do you, or not, remember that Davis was present?

A. Yes, I remember that from recollection.

Q. This corner was a pine tree?

A. Yes.

Q. How did you mark it?

A. I put the initials of Davis on it, and whether it was Walker or Norcross that I put on the other side I can't remember which.

Q. Walker was there?

A. Yes; I know I put on Davis; I think it very probable I put on mine and the date.

Q. This pine tree was 235 rods from the Saco River?

A. Yes.

Q. You put it up as the N. E. corner of Elkins' grant?

A. Yes.

184 Q. Did you do any further surveying in that connection for the purpose of locating the east line of Elkins' grant?

A. I surveyed the Saco River.

Q. Did you draw any plan of Elkins' grant?

A. I did.

Q. By your survey made at that time, how did you claim that you were ascertaining the eastern bound'ry of Elkins' grant?

A. I run the bounds of Saco River; called that the middle bound'ry of Hart's location, and then located on paper 235 rods from that.

Q. From what point in the west line of Hart's location did you propose to start to strike the N. W. corner of Albany?

(P'ff objects. Admitted. Exceptions saved.)

185 A. In answer to that question I will say, by the information that I then had, if I had gone right on at that time I would have gone to the nearest point from Hart's location to the N. W. corner of Albany.

Q. Then you proposed to run from that point which was nearest to the corner of Albany?

A. Yes, sir; that is what I should have done.

Q. But you didn't run that line?

A. No, sir; I didn't.

Q. You did run down on Saco River, and claim the distance which the east line of Elkins' grant would correspond with the west line of Hart's location?

A. Yes.

Q. That was with a view to see where the east line of Elkins' grant was?

A. Yes; that was the object of that survey.

186 Q. And it was 235 rods west of Saco River?

A. That was my view.

Q. Till you reached a point where Hart's location was—the nearest to the N. W. corner of Albany?

A. Yes; that was my view.

Q. And thence to the N. W. corner of Albany?

A. Yes.

Q. You made a map on that idea?

A. Yes.

Q. You didn't put on the map the line you didn't run?

A. No.

Say whether or not there was any conversation at any time while at the N. W. corner of Albany in the presence of Walker, or by

187 Walker, as to where you were coming out.

A. As I have before stated, Walker's (I don't know the exact language, but I know by his actions and what he said) calculation was to come out by Sawyer's River.

Q. What time in the day did you start?

A. In the morning.

Q. Where were you when night overtook you?
A. Up on the mountain.
Q. Had you made any preparations for camping out that night?
A. No; we were out on the mountain with nothing to eat, and it was raining like venge'nce.
Q. How large a pine tree was this that you marked?
A. I should say it was a tree about six inches through; it might be 8 inches; I don't think it was 10; a small sapling pine.

188 Q. Have you since that time made any examination for that corner?

A. I have, in 1874; I have got the date of the time I did it.
Q. You made no examination till 1874?
A. No, sir.
Q. Did you ever find it?
A. I went down there (and I don't wish to be understood that I positively remember), but unless I am mistaken I found a place where that pine tree was; I found a tree about the size of that; it was so entirely rotten that I could not decipher any mark on it.
Q. So the tree is now down and gone?
A. I suppose that the tree is no longer standing; that is, unless I was mistaken in the tree and the ground it stood on; I think I was not.

Direct resumed:

189 Q. Please look at your minutes, and say whether or not you found an old line as far north as the Pond Brook.

A. I have stated that I believe I found an old line that continued on to Pond Brook from Sawyer's River.
Q. Is that the same as Nancy's Brook?
A. I think not.
Q. What is it the outlet of?
A. I don't know; I think it is the outlet of a little small pond.
Q. How far is it from Elkins' grant north line?
A. I think it is a little over 500 rods.
Q. How far is the outlet of Nancy's Pond from Elkins' north line?
A. I think it was over two miles.

190 Q. This, what you call Pond Brook, is north of Nancy's Brook?

A. Yes; I call it Pond Brook because they called it Pond Brook at the time.
Q. This which you laid down at this west line of Hart's location you marked a pine tree?
A. Yes.
Q. Can you tell me whether that pine tree lies easterly of the line that runs north from the S. E. corner of Elkins' grant?
A. My calculation was to take a tree on that line.
Q. Does that tree which you marked on which you bound Hart's location lie easterly of the line which you run north from the corner of Albany?
A. It would be east of it.
Q. Can you give me the number of degrees east?
A. I don't know that I can unless I took a scale and dividers.

191 Q. Now, from that pine tree, following the Saco River southerly, doesn't the Saco River all the time run to the easterly?

A. It runs to the southerly for quite a distance and then turns and runs almost easterly.

Q. So that the further you go down the river the further you are from this north and south line?

A. Yes.

Q. Now you say that they all agree to that pine tree; who do you mean by all?

A. Mr. Walker and Davis.

Q. Did you run the line of Hart's location below this pine tree?

A. Did not; only went right back on the river.

Q. This line you put on your map isn't a line you run then?

192 A. This line is put on parallel with the line of the river which I did run and measure.

Q. Did you actually run what you call the west line of Hart's location?

A. I didn't. I run on the river.

Recalled:

Q. Did you make an estimate of the angle I requested you to?

A. I did; as near as I can compute it, it is 15° east from Albany to the pine tree.

Q. Are these old courses magnetic courses?

A. Certainly.

Q. What has been the variation since 1830?

A. I make on a line I run in 1832 if I run it over again with the same compass 2½, and a little more, pretty strong towards 3°. It may be a little different on the lines we are speaking of.

193 Q. Is there a pond near the north line of Elkins' grant?

A. My impression is, there was.

Q. Which side of the line that you run?

A. On the west side, I should say.

Q. How near did you run?

A. I should say, not more than a dozen rods.

Q. You found the pond on the left hand?

A. Yes; if you should ask that question again, upon reflection perhaps I might alter the distance.

194 JAMES ROGERS testifies:

Reside in Jackson; age, 65 next March.

Q. Did you ever go through on the east line of Elkins' grant with any person?

A. I did.

Q. With whom first?

A. James Willey, the land com'r.

Q. Who else?

A. Aipheus Bean & Ezra Meserve.

Q. When was that?

A. I don't know as I can tell; it was when I was a young man.

Q. Before or after Meserve became owner of any property there?

A. He was about to buy land; what I went for was to help run it out.

Q. What duty did you do?

A. I lugged the chain most of the time—Mr. George and I.

195 Q. Walker George?

A. Yes.

Q. Is he living?

A. No.

Q. Where did you start?

A. From Albany corner.

Q. Recollect what there was at that corner?

A. A hemlock tree.
Q. Which way did you go from there?
A. North.
Q. Did you run a new line?
A. There was an old line that had been spotted some year or 2 or 3 years. I can't tell about that exactly.
Q. Whether your party followed that or made a new line?
A. We made a new line; we went right through on that; we run it with his compass; he kept that line pretty much; I don't know why we didn't; it seemed to run the same line we wanted to go.
196 Q. Did you make a new line or re-mark the old one?
A. Went right over it.
Q. Do you know how many miles north you went?
A. No, sir; I think we might have gone 5 or 6 miles, perhaps more.
Q. When you left your work and came out, where did you come out?
A. On the turnpike up beyond the Crawford place about 2 miles.
Q. Any hill there?
A. The place where we came out was called Filer's Hill.
Q. Did you come out at an angle to the river or facing the river?
A. We went out square right to the river; the road was very close to the river.
Q. Facing it?
A. Yes.
Did you do any work after that, after you got to Filer's Hill?
197 A. No, sir; that was as far as we went.
Q. Have you ever been on the line since?
A. Yes.
Q. With whom?
A. Mr. Pitman; last fall.
Q. Are you sure you were on the same line?
A. I think I am.
Q. Did you recognize anything then?
A. Yes; a good many things.
Q. What?
A. Sandy Brook particularly, & the ledge laying up to the right; it is a very large and pretty steep ledge.
Q. When you run through with Willey which side of you was Sawyer's pond?
A. On the west side.
Q. What time in the year was it?
A. The fall, I think.
Q. Did Willey have a compass?
A. Yes.
Q. When you were on the line with Pitman did you see anything of Saunders' mill?
198 A. When we quit that line to come out we came down by his mill.
Q. Did you go clear to the north line of Elkins' grant?
A. I think ⅔ of the way through.
Q. Which side of the mill was the line that Willey run?
A. West side.

Cross-ex.:

Q. Did you go with anybody the last fall to the upper end of the line you went over with Willey?

Q. At the time you went over this line with Willey where did you terminate your survey?

A. We commenced at Albany and run north till we came out on the turnpike—till we got to what was called the north line of Elkins' grant; I think then we turned and ran east till we got to the turnpike.

Q. Was there any mark at the termination of that line?

199 A. There was a birch tree and we piled up rocks and spotted it. I could not find it when I was there because the freshet had thrown the rocks away and they had built a railroad.

Q. You were there last fall with Mr. Saunders?

A. Yes.

Q. Who else?

A. Franklin George.

Q. Who else?

A. The 2 Mr. Saunders.

Q. Did you see a birch tree marked & tell them you came out there?

A. No, sir; I told them it wasn't 8 or 10 rods from where Willey came out, and they said I made a very good guess for the times.

Q. Was that near the turnpike?

A. It was right on the turnpike.

Q. This was last fall?

A. Yes.

200 Q. Did you tell them that you run from Albany corner straight to that line?

A. No; I was a young man and didn't keep any figures, and had to lug the chain or else spot with an ax.

Q. Did Willey keep on spotting trees in the same way till he came out to that point?

A. He made a change from Elkins' grant. He run east.

Q. Did you say to Mr. Saunders and George that you run directly to the place where you saw the birch tree?

A. I don't think I said so; if I did, I didn't say right.

Q. Did Willey, in fact, put up a monument at the beach tree?

A. There was nothing of any amount to make marks to; that was why we piled some stones up; there was a little white birch tree or stub or something of the sort.

201 Q. What is your occupation?

A. I am a blacksmith by trade, and I work on the farm.

202 MARK W. PIERCE testifies:

Live at Center Bartlett.

Q. About what is your age?

A. 53 in August.

Q. Did you ever at any time perambulate Elkins' grant?

A. I did once.

How long ago?

I have no minutes fixing the time; 30 years or rising.

Q. What was the occasion of it?

It was about the time that Sam'l Walker sold to the Eastern Lumber Co., as they called it—Norcross, Fisk & Co.

Q. You were then working for Norcross?

A. I was.

Q. Who went in the party?

A. I don't know as I can state.

203 Q. How many were with you?

A. Five or six, I should say.

Q. Norcross or Walker go, either of them ?

A. I think Walker went as far in as to put us on the line and returned home the same day.

Q. Was there anybody there to represent Mr. Walker ?

A. There was the man that run the line there to represent him.

Q. Who was that ?

A. I don't recollect his name. I think it was a man that had run the line previously.

Q. Was he a surveyor ?

A. I think he was.

Q. Where did you go in on the line ?

204 A. We started in from Woodstock by the way of Thornton Gore, so-called.

Q. And went which way ?

A. In an easterly direction; it would be striking towards Albany & Waterville.

Q. Did you go to the corner of Albany ?

A. I don't recollect any corner of Albany being spoken of. We run on a line that had been made, as I understood; at the time Mr. Walker was showing what he had transferred to Norcross, having a representative there, who took some minutes, and the compass was set sometimes. We didn't run an original line, but traced one that had been already run.

Q. Did you go over to the corner of Albany ?

A. We did.

Q. Then, from the corner of Albany, which way did you go ?

205 A. Towards the mountain, towards Hart's location.

Q. Did you go northerly or easterly.

A. Northerly.

Q. Whether you found a previous line ?

A. There was a line, when we were there, most of the way.

Q. Did you follow that line ?

A. We did.

Q. Did anybody point out the line to the party ?

A. The surveyor had been on it.

Q. How far did you follow that line ?

A. From Albany towards Hart's location, till we got in the vicinity of Sawyer's River, according to my best recollection.

Q. Then what occurred ?

206 A. We didn't seem to find the line; it seemed to be understood that we should not find any line; we didn't find any, I think, for a piece.

Q. For how long a distance did you loose the line ?

A. I hardly know how far the distance was. I think we found a line that had been before we got to the next corner, where he started to go in towards Lincoln again.

Q. The general courses of that line were in one direction as you went through *as you went through* from Albany corner till you turned to go towards Lincoln; what was the general course of that line ?

A. Northerly, perhaps, not due north. I think it varies a little; from recollection, it varies a little somewhere on the line; we changed our course again.

Q. How old were you ?

A. Not one-and-20, I should say.

207 Q. Which side of Sawyer's pond did that line pass ?

A. In going north, Sawyer's pond was to the right of us.

Q. Do you know where Saunders has lately built a mill?
A. Yes, sir; I have been to his mill.
Q. Going north, is that mill to the right or left of that line?
A. It would be to the right.
Q. Have you ever seen that line since that time?
A. I was on the line last fall.
Q. With whom?
A. G. W. M. Pitman, of Bartlett; Mr. Rogers, of Jackson.
Q. Had you any doubt it was the same line that you saw before?
A. No; I had none in my own mind.
208 Q. Did you find a line on the north of Elkins' grant?
A. Yes, sir.

Cross-ex.:

Q. You can't recollect the name of the person who acted as surveyor?
A. I should not want to swear positive who it was.
Q. Can you tell how old a man he was?
A. I don't think I could.
Q. Who was the leader of the party after you got into the woods?
The man who had previously run the line.
Q. This man, whoever he was?
A. Yes.
Q. How far into the woods did Walker go with you; as far as the line of Albany?
A. No, sir; nowhere near.
209 Q. Did you run with an instrument?
A. Took a compass; didn't run, but trailed a line.
Q. Did you chain at all?
A. Did not.
Q. Did you spot or mark any line?
A. They spotted some trees
Q. Have you any recollection how frequently?
A. I don't know as I have.
Q. Have you any idea how they were able to spot any trees making no measurements?
A. When they set their compass to see the course the line was running, trailing, if near there we found a tree in the line that wasn't spotted it was spotted often by the parties.
Q. What did you do in this journey?
210 I lugged such stuff as we had in the woods, bags, etc. I was a boy, working for him, and did what he sent me to do.
Q. Do you know whether the owners of any other tract of land were represented at that time.
A. I don't know that there was.
Q. You took no measures to ascertain the age of the marks you followed?
A. Not any at all.
Q. You can't recollect how many new marks you made yourself?
A. No.
Can you tell what was the purpose of walking around this line if you made no measures?
A. I understood it to be about the time of the transfer. Mr.
211 Walker was showing it to the opposite party.
Q. Was there any of the purchaser with you?
A. Yes, a representative who took notes.
Q. Who was it?

A. I would not want to say; it might have been a brother; it might not. I won't swear to seeing Mr. Norcross.

Q. You have been asked how this line was run with reference to the Saunders' mill. How near did it come to where the mill is now?

A. I have no means of knowing, for I haven't been from the line directly to the mill.

Q. How can you know then that the mill is one side or the other of the line?

A. I went from the line to the mill, but I went diagonally over probably 6 times the distance that it would have been to go to the mill
212 at the nearest point on the line.

Q. You went on this line last fall?

A. Yes, sir.

Q. Where did you go on the line?

A. I went from Albany corner to some half or a little more than half or ¾ of a mile across Sawyer's River.

Q. Then where?

A. Then down to Saunders' mill & then home.

Q. At whose request did you go last fall?

A. The first one that requested me, I think, was Mr. Saunders; next one was Mr. Putnam; next one Mr. Jose, and the immediate request on the day we started was from Judge Pitman, I believe.

Q. You went ½ mile or some such matter beyond Sawyer's River?

213 A. I went far enough to satisfy me that there was a country I had seen before, and that was as far as Mr. Saunders and Mr. Jose had wanted me to go.

Q. It was a wooded country?

A. Yes.

Q. What natural landmarks did you recollect?

A. Ledges & the shape of certain mountains, bluffs, cliffs that we run near proximately to.

Re-ex.:

Q. How many years have you traveled that country almost daily through that notch road?

A. It is twenty-six years since I began running with the mail from Plymouth and Littleton. I quit 4 years ago, since the cars ran.

Q. Pretty familier with the country?

A. Pretty familier near the roads.

214 DANIEL ELKINS testifies:

Live in Gilmanton; 73 years old; went to Thornton about 47 years ago; lived there 6 years; knew Jacob Sargent, jr.; Enoch Flanders; Sargent lived in Thornton; Flanders was there part of the time; knew Sam. H. Walker; lived in Thornton all the time while I lived there; knew Jonathan Cummings; he lived in Plymouth; he was a surveyor; I think they are all dead; Jasper Elkins was my father; he died 18 years ago.

Q. Did any of these persons claim to be interested in Elkins' grant?

A. My father, my brother, Jacob Sargent, Enoch Flanders were.

Q. What about Sam'l H. Walker?

A. He was, too.

215 Q. Did you have any interest in it?

A. Not any at all.

Q. What has been the name or style of the grant that lies north of Elkins' grant?

A. Sargent's grant.

Q. Did you ever claim an interest in that?

A. Yes, sir; I did.

Q. Now, did you go at the time you lived in Thornton, on the north line of Elkins' grant?

A. Yes, sir.

Q. About how long after you moved to Thornton?

A. I think it was about two years, as near as I recollect.

Q. Who went with you?

A. Jacob Sargent, Enoch Flanders, Joseph Robins, Sam'l Alexander, and J. A. Prescott.

216 Q. Anybody else that you think of.

I don't think of anybody now. There were 6 of us.

Q. All dead but you?

A. Yes, as far as I know. I can't say that they are, but I have heard of their deaths.

Q. What did you go out there for?

A. To run around Sargent's grant; that was our purpose.

Q. Any purpose of laying off the grant into lots?

A. We calculated to make the corners on the line as we went along.

Q. Where did you go on the line?

A. We commenced at Franconia corner.

Q. And went which way?

A. In an east course.

217 Q. Did you make a line, or trace an old line?

A. Capt. Jacob Sargent traced an old line, and we measured *measured* off one mile, and then after that we measured off 160 rods. We made corners every 160 rods on Sargent's grant as far as we went.

Q. Did you go through to the turnpike in the Saco Valley?

Q. At what point did you start on the line north?

A. We started a north course or very near that.

Q. Where did you start a north course—at this fir tree?

A. Yes, or very near that. I can't say positive that it was that.

Q. Was there any conversation between Sargent and Flanders or either of them and you about that fir tree?

A. There was, sir.

218 Q. Was there anything said about who made that corner?

A. Capt. Jacob Sargent said that he and Squire Cummings helped make it when the Elkins grant was run out.

HATCH. We ask your honor to reserve our objection to this particular testimony, that it may have further consideration if necessary.

COURT. Proceed.

Q. Was anything said about running a line from that corner to the south?

A. He said that was the corner they made when they run the east line of Elkins' grant.

Q. Did he say who run it?

A. He told me that Squire Cummings run that east line.

Q. Was that fir tree marked in any way?

A. It was marked on 3 sides.

219 Q. Do you recollect the marks that were on it.

A. There were some letters on it. Did you mean which side it was marked? It was marked on the south side and on the northwest

side, on the west side, and I think there was a mark on the east side. We marked it on the north side.

Q. Do you recollect what the letters were on the tree?

A. I recollect one of them positive, but the other one I don't. I recollect there was an "E" on it.

Q. How near the summit or heighth of land was that tree?

A. I wasn't down to the river nor down to the turnpike; I can't tell the distance it was; it was some little distance. We didn't go any further on that line. It was over the ridge or hill, what you are
220 a mind to call it, canting a little down towards the Saco River, where it cants over that way.

Q. Was it a quarter of a mile down?

A. No, sir; it wasn't a quarter of a mile I don't think over the cant.

Q. Was it a quarter of a mile down from the ridge?

A. I can't state positive whether it was; I think it was not more than that, if it was that.

Q. Do you recollect how far it was from the corner of Lincoln to this fir tree?

A. It was 7 miles and some rods; it wasn't 8 miles; we didn't make it that.

Q. You were at one time down on the line between Waterville and Burton.

A. I was.

Q. When was that?

221 A. As near as I can recollect it was about two years afterwards.

Q. Who was there with you?

A. Squire Cummings, Sam'l H. Walker, Capt. Jacob Sargent and a young man by the name of Fisher was there, and Lyford; I think that was all.

Q. Where did you commence?

A. At the S. E. corner of Waterville.

Q. Was that also the corner of Burton or on the Burton line?

A. I think it was.

Q. What line did you trace?

A. I think the line was between Burton and Waterville.

Q. Which way did you go?

222 A. North course.

Q. Did you go at that time to any particular tree or mark of any kind?

A. We came out to a hemlock tree. We crossed a small pond; how we got around the pond I don't know, but after we got beyond the pond we come to a hemlock tree, to the S. E. corner of Elkins' grant.

Q. At whose request did you go at that time?

A. My father's.

Q. Was this hemlock tree marked in any way?

A. Yes.

Q. Do you recollect whether there was more than one mark on it?

A. There were three (3) marks that I recollect.

Q. Was there anything said in the presence of Sargent or Walker or either of them as to what that tree was?

223 Cummings said that was the corner that he made when he run Elkins' grant out.

D'f't excepts to this last answer.

Q. Anything else said in the presence of these men where he run?

A. He told me that he run a north course or very near that; I won't say that was the exact point of compass, but it was a north course.
Q. Anything else said as to how far he run?
A. I understood they went through.

54

Cross-ex.:
(As to who first called his attention to this matter.)

55

Q. After you went home that day what occasion had you to tell anybody, or anybody to enquire of you, what was said when you were at that corner.
A. I think my brother and my father did at that time.
224 Q. What did they ask you?
A. They asked me where we found that corner, and what it was?
Q. Was there any more said about it?
A. I can't recollect.
Q. When did you have occasion to refer to it again after that?
A. I can't tell you.
Q. Did you ever till you were inquired of lately?
A. I won't say but I have 20 times, and I won't say that I have at all. No, sir; I can't tell; if I could I would.
Q. About what you say Squire Cummings said at the south end of the line, that that was a corner he made when he run Elkins' grant? Who did you tell that to after it was said?
225 A. I think, likely, I told my father when I went home.
Q. What occasion had you to tell your father that?
A. Because he asked me.
Q. Do you think he asked you?
A. I think he did.
Q. What did he say?
A. He asked me where I found the corner, and if we found the corner that was made when the grant was run out.
Q. You are talking now about the corner found when you run the line between Burton and Waterville; did he say that was the corner that he made when he run Elkins' grant?
A. Yes.
Q. Did you understand it to be the corner of anything else but the corner of Elkins' grant?
226 A. I understood it to be the corner of Waterville, too.
Q. Who did you understand that from?
A. By Squire Cummings, I understood it was.
Q. Did you understand it to be the corner of anything else than that?
A. I don't know that I was told anything else at all, only what I supposed myself.
Q. On that occasion you started from the S. E. corner of Waterville?
A. Yes.
Q. Do you recollect what that was?
A. No, sir; I don't.
Q. Did Cummings or anybody else tell you how they located that?
A. They took a man that went on there and showed us the corner.

227 Q. Do you recollect anything that was said about that corner?
A. No, sir.
Q. Now, when you run the south line of the Sargent grant, where did you start from?
A. At the Franconia corner.
Q. What was there then?
A. A yellow birch.
Q. What letters or marks?
A. I can't say what letters.
Q. Can you tell on what side it was spotted?
A. On the south side, the east side, the north side, and the west side.
Q. When you got to the fir tree, that you found spotted only on 3 sides?
A. Only on 3 sides.
228 Q. Did you understand you had got to Hart's location?
A. They didn't say anything about whether it was Hart's location.
Q. Whether the people you were with said they had got to Hart's location?
A. They didn't.
Q. Didn't say whether they had or not?
A. No, sir.
Q. Have you told anybody within a day or two that when you got to that fir tree you got to Hart's location?
A. Not that I know of.
Q. Did you tell Mr. Daniel Saunders that you and your people understood you had got to Hart's location?
Q. Did you tell him that you and your party said you had arrived at Hart's location?
229 A. I told him I didn't know where Hart's location was. I supposed we had got to Hart's location. I didn't know anything about where Hart's location was.
Q. You did tell Mr. Saunders you supposed you had got to Hart's location?
A. Yes; but I didn't know anything about it.
Q. Did you tell him also that your party supposed you had got to Hart's location?
A. I supposed they thought so. I don't know that they did.
Q. You told this to Mr. Saunders in the presence of Mr. Crawford?
A. I can't say that I did not.
Q. Now, after refreshing your recollection, say whether you supposed you had arrived at Hart's location?
A. I don't know whether I had arrived there, but I supposed that I had.
230 Q. Whether your party said anything which indicated that they supposed they had? What was said and what was the substance of what was said?
A. I can't tell their ideas.
Q. Can you tell whether they gave you to understand that they supposed they had arrived at Hart's location?
A. That was my impression that they did, but as to telling what they said I can't tell.
Q. That was the idea you had at that time?
A. That was the idea I had; I didn't know where Hart's location was.

Q. Do I understand that you attempted to run a line north from that point?

A. We set out to.

Q. What progress did you make?

A. Not much of any.

231 Q. Can you tell how many miles or rods you went?

A. Not any miles.

Q. Any rods?

A. We set the compass and went a few rods.

Q. Did you mark any tree in that direction?

A. I can't say whether we did or didn't.

Q. That fir tree you marked on the north side?

A. I think we did.

Q. Have you any doubt about it?

A. We did according to my best recollection.

Q. Do you recollect what mark you put on it?

A. Only a spot.

Q. It had been marked on 3 sides?

A. It had.

Q. Did you trace any other line from that tree?

232 A. No, sir.

Q. South?

A. No, sir; only set out to run the line north and it came on rainy.

Q. About what time in the day did you leave off?

A. Can't say, some time in the forenoon.

Q. What did you do?

A. Went home.

Q. You traced the line back?

A. Followed the line back some of the way, and some of the way we didn't.

Q. What part did you take in that expedition?

A. Carried the hind end of the chain.

Q. Who acted as surveyor?

A. Capt. Sargent traced the line with a compass.

233 Q. Did he keep record of course and distances?

A. Can't say.

Q. What sort of a country did you find?

A. Some part was pretty rough and some part very smooth.

Q. On the whole rough or smooth?

A. Rather rough. There was one place we could not get over, had to go around. We calculated to give what allowance we thought we ought to.

Q. As you went along?

A. Yes; we generally made a kind of a rule to allow the length of a man's arm. It was a 2 rod chain; 20 miles home from Franconia corner; left home in the morning; didn't get to Franconia corner that night; started on the line early in the morning; reached the fir

234 tree next day, in the A. M. Didn't cut our way; it had been traced out; there wasn't much of anything in the way.

235 DISTRICT OF N. H.:

U. S. circuit court, May term, 1878. May 14th.

THE BARTLETT LAND & LUMBER CO.
v.
DANIEL SAUNDERS.

The parties agree that the value of the demanded premises at the

time of the commencement of the suit and now exceeds the sum of five thousand dollars.

HATCH & BINGHAM, *Att'ys for Def't.*
W. L. PUTNAM, RAY, DREW, & JORDAN,
For Pl'ffs.

Filed May 14, 1878.

236 At the close of the plaintiff's evidence the defendant, without introducing any evidence, moved that the court instruct the jury to return a verdict for the defendant. Whereupon the court made the following rulings to the jury and directed them to return a verdict for defendant;

The court proposed to send the jury out to sign and bring in their verdict in accordance with said rulings, but, by consent of parties, the verdict was taken without the jury leaving the court room.

1. That in the construction of deeds, monuments fixed and certain, or which can be made fixed and certain, will govern the course and distance.

2. That Hart's location having been originally granted by a
237 deed or grant made upon an actual survey by metes and bounds, which bounds can be recognized and located, and having long been occupied by settlers, and surveyed and recognized by the government of N. H., is such a monument, and will control the distance given in the line running east on the north side of the Elkins grant, notwithstanding the exterior line of Hart's location is not shown upon the ground at the point where the north line of Elkins' grant running east would strike it.

3. That, by the true construction of the Elkins grant, the line runs on the northerly side east to the westerly side of Hart's location; thence southerly by Hart's location to the nearest point to the northwest corner of Burton (now Albany).

4. That there is no evidence before the jury to estop or bar
238 those claiming under the Elkins grant from maintaining that line; and that upon the case, as it now stands, the demandant is not entitled to recover.

The plaintiff objected and excepted to each of said rulings and instructions to the jury, and before the case was submitted to the jury prayed that each of said exceptions might be noted and allowed by the court, and the same were severally so allowed.

And now plaintiffs pray that, whereas all said exceptions and other matters herein stated and referred to do not appear of record, that this honorable court may set their seal to this bill of exceptions, and may order the said bill of exceptions, with all the papers thereto annexed, be duly entered of record and recorded in the said cause.

THE BARTLETT LAND & LUMBER CO.,
By WILLIAM L. PUTNAM,
RAY, DREW & JORDAN,
Attorneys.

239 All which being found true, are allowed, and the same, with said papers, ordered to be entered of record and recorded as prayed for.

Signed and sealed as of May 14, 1878, the day on which the verdict in the case was rendered.

Allowed:
[SEAL.] DAN'L CLARK, *Judge.*

240 And on the 14th day of May, A. D. 1878, the cause having been submitted to a jury of twelve men, a verdict was returned as follows:

Verdict.

NEW HAMPSHIRE DISTRICT, *ss:*

Circuit court U. S., May term, 1878.

BARTLETT LAND AND LUMBER COMPANY }
v.
DANIEL SAUNDERS. }

The jury find that the defendant did not disseize the plaintiffs in manner and form as the plaintiffs have thereof above declared against him.

HENRY W. CLAPP,
As Foreman.

A true record. Attest:

WILLIAM H. HACKETT, *Clerk.*

241 *Judg't B. L. & L. Co. v. D. S.*

Whereupon all the above being seen and known, it was on the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, considered and adjudged that the plaintiff corporation take nothing by its writ except the premises disclaimed by the said defendant, and that the defendant recover of the plaintiff corporation his costs of suit taxed at dollars and cents.

Attest:

WILLIAM H. HACKETT, *Clerk.*

A copy of the record. Attest:

WILLIAM H. HACKETT,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

242 DISTRICT OF NEW HAMPSHIRE:

Circuit court, May term, 1878.

THE BARTLETT LAND & LUMBER CO. }
v.
DANIEL SAUNDERS. }

This plan of the witness, G. W. M. Pitman, made for pl'ff and referred to in his testimony, or a copy thereof upon a reduced scale; also a similar copy of the plan of Geo. T. Crawford, made for def't and used by def't on trial, and shown to the court and jury, may be made a part of the record and used in the agreement as chalks merely of the land in controversy and the adjacent grants.

W. L. PUTNAM, RAY, DREW & JORDAN,
For Pl'ff's.

DANIEL SAUNDERS,
By his att'ys, HATCH & BINGHAM.

Filed May 15, 1878.

243 Circuit court of the United States, district of New Hampshire.

To the Hon. Nathan Clifford, associate justice of the Supreme Court of the United States.

And now comes the Bartlett Land and Lumber Company, a corporation, and respectfully represents: In the records and proceedings and also in the rendition of judgment in a cause and plea of land between said corporation as plaintiff and Daniel Saunders as defendant, in which judgment was rendered against the said corporation at the May term, A. D. 1878, of the circuit court of the United States, for said district, manifest error has intervened to the great damage of said corporation and the matter in dispute in said plea and cause exclusive of costs exceeds and exceeded the sum and value of five thousand dollars.

244 Wherefore said corporation prays for the allowance of a writ of error to the Supreme Court of the United States and such other process as may cause the said error to be corrected by said Supreme Court.

By its att'y:

W. L. PUTNAM.

MAY 21ST, A. D. 1878.

A copy. Attest:

WILLIAM H. HACKETT,
Clerk Circuit Court U. S., Dist. of N. H.

245 UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States for the district of New Hampshire, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Bartlett Land and Lumber Company, a corporation established and existing under the laws of the State of Maine, and having its established place of business in said State, and a citizen of same State, plaintiff, and Daniel Saunders, of Lawrence, in the county of Essex, and in the State and district of Massachusetts, a citizen of same State of Massachusetts, defendant, in a plea of land, a manifest error hath happened, to the great damage of the said Bartlett Land and Lumber Company, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme

240 And on the 14th day of May, A. D. 1878, the cause having been submitted to a jury of twelve men, a verdict was returned as follows:

Verdict.

NEW HAMPSHIRE DISTRICT, *ss:*

Circuit court U. S., May term, 1878.

BARTLETT LAND AND LUMBER COMPANY
v.
DANIEL SAUNDERS.

The jury find that the defendant did not disseize the plaintiffs in manner and form as the plaintiffs have thereof above declared against him.

HENRY W. CLAPP,
As Foreman.

A true record. Attest:

WILLIAM H. HACKETT, *Clerk.*

241 *Judg't B. L. & L. Co. v. D. S.*

Whereupon all the above being seen and known, it was on the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, considered and adjudged that the plaintiff corporation take nothing by its writ except the premises disclaimed by the said defendant, and that the defendant recover of the plaintiff corporation his costs of suit taxed at dollars and cents.

Attest:

WILLIAM H. HACKETT, *Clerk.*

A copy of the record. Attest:

WILLIAM H. HACKETT,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

242 DISTRICT OF NEW HAMPSHIRE:

Circuit court, May term, 1878.

THE BARTLETT LAND & LUMBER CO.
v.
DANIEL SAUNDERS.

This plan of the witness, G. W. M. Pitman, made for pl'ff and referred to in his testimony, or a copy thereof upon a reduced scale; also a similar copy of the plan of Geo. T. Crawford, made for def't and used by def't on trial, and shown to the court and jury, may be made a part of the record and used in the agreement as chalks merely of the land in controversy and the adjacent grants.

W. L. PUTNAM, RAY, DREW & JORDAN.
For Pl'ff's.

DANIEL SAUNDERS,
By his att'ys, HATCH & BINGHAM.

Filed May 15, 1878.

243 Circuit court of the United States, district of New Hampshire.

To the Hon. Nathan Clifford, associate justice of the Supreme Court of the United States.

And now comes the Bartlett Land and Lumber Company, a corporation, and respectfully represents: In the records and proceedings and also in the rendition of judgment in a cause and plea of land between said corporation as plaintiff and Daniel Saunders as defendant, in which judgment was rendered against the said corporation at the May term, A. D. 1878, of the circuit court of the United States, for said district, manifest error has intervened to the great damage of said corporation and the matter in dispute in said plea and cause exclusive of costs exceeds and exceeded the sum and value of five thousand dollars.

244 Wherefore said corporation prays for the allowance of a writ of error to the Supreme Court of the United States and such other process as may cause the said error to be corrected by said Supreme Court.

By its att'y:

W. L. PUTNAM.

MAY 21ST, A. D. 1878.

A copy. Attest:

WILLIAM H. HACKETT,
Clerk Circuit Court U. S., Dist. of N. H.

245 UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States for the district of New Hampshire, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Bartlett Land and Lumber Company, a corporation established and existing under the laws of the State of Maine, and having its established place of business in said State, and a citizen of same State, plaintiff, and Daniel Saunders, of Lawrence, in the county of Essex, and in the State and district of Massachusetts, a citizen of same State of Massachusetts, defendant, in a plea of land, a manifest error hath happened, to the great damage of the said Bartlett Land and Lumber Company, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, this twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

WILLIAM H. HACKETT,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court, U. S.

Circuit court of the United States, district of New Hampshire, ss.

And now, here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, William H. Hackett, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this twenty-first day of May, A. D. 1878.

[SEAL.] WILLIAM H. HACKETT, *Clerk.*

(Indorsed:) 80. Writ of error. Bartlett Land and Lumber Co., plaintiffs in error, vs. Daniel Saunders, def't in error.

246 UNITED STATES OF AMERICA:

First circuit.

To Daniel Saunders, of Lawrence, in the county of Essex, and State and district of Massachusetts, esquire:

You are hereby notified, cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, and in the first circuit, wherein the Bartlett Land and Lumber Company, a corporation existing under the laws of the State of Maine, and doing business in said State of Maine, having its principal place of business in Portland, in said State, is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the
247 said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, Associate Justice of the Supreme Court of the United States, this twenty-first day of May, in the year of our Lord, one thousand eight hundred and seventy-eight.

NATHAN CLIFFORD,
Associate Justice Sup. Court, U. S.

DISTRICT OF NEW HAMPSHIRE, *ss:*

MAY 23, 1878.

I this day summoned the within named Daniel Saunders to appear as

within commanded by giving in hand to Albert R. Hatch, attorney for the said Saunders, a true and attested copy of the within citation.

JOSEPH P. MORSE,
U. S. Dept. Marshal.

Fees: Travel, ; service, 2.00; copy, 1.00=$

A copy. Attest: WILLIAM H. HACKETT,
Clerk, &c.

248 Know all men by these presents, that the Bartlett Land and Lumber Company, a corporation existing by the laws of the State of Maine, having its principal place of business at Portland in said State, as principal, and H. N. José, of Portland, county of Cumberland, and Samuel Hanson, of Buxton, county of York, both of Maine, are holden and stand firmly bound unto Daniel Saunders, of Lawrence, in the county of Essex, and commonwealth of Massachusetts, esquire, in the sum of two thousand dollars, to the payment of which to the said Daniel Saunders, or his executors, administrators, or assigns, we, the said corporation, and its sureties bind ourselves, our heirs, executors, and administrators and successors, jointly and severally, by these presents.

249 The condition of the obligation is such that whereas lately in a suit depending in the circuit court of the United States for the district of New Hampshire, between the Bartlett Land and Lumber Company aforesaid and said Saunders, judgement was rendered against said company, and the said company having obtained a writ of error, and filed a copy thereof in the clerk's office of said court to reverse the judgement in the aforesaid suit, and a citation directed to said Saunders, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next.

Now, if the said Bartlett Land and Lumber Company shall prosecute said writ of error to effect and if said corporation fails to make
250 its plea good, shall answer all damages and costs, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this day of May, A. D. 1878, the signature of said corporation and seal being by its treasurer thereto duly authorized and empowered.

BARTLETT LAND AND LUMBER CO.,
By H. N. JOSE, *Its Treasurer.*
H. N. JOSE. [SEAL.]
SAMUEL HANSON. [SEAL.]

Signed and sealed in presence of—
EDW'D GARDNER. [SEAL.]

Approved by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of New Hampshire.

Attest:

WILLIAM H. HACKETT,
Clerk C. C. U. S., N. H. District.

251 UNITED STATES OF AMERICA,
District of New Hampshire, ss:

I, William H. Hackett, clerk of the circuit court of the United States for the first circuit, and district of New Hampshire, certify that the foregoing is a true copy of the record and judgment in the cause of Bartlett Land and Lumber Company against Daniel Saunders, action at law, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Portsmouth, in said district of New Hampshire, on this twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and in the Independence of the United States the one hundred and first.

[SEAL.] WILLIAM H. HACKETT,
Clerk of said Court.

(Indorsement on cover:) No. 251. The Bartlett Land and Lumber Company, plaintiffs in error, vs. Daniel Saunders. New Hampshire C. C. U. S. Filed 11th October, 1878.

OFFICE SUPREME COURT U. S.
FILED
MAR 3 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 251.

BARTLETT LAND AND LUMBER CO., PLAINTIFF IN ERROR,

v.

DANIEL SAUNDERS.

ABSTRACT, ASSIGNMENT OF ERRORS, AND POINTS FOR PLAINTIFF IN ERROR.

By William L. Putnam, *of Counsel.*

Stephen Berry, Printer, 37 Plum Street, Portland, 1881.

SUPREME COURT OF THE UNITED STATES.

1 No. 251.

BARTLETT LAND AND LUMBER CO., PLAINTIFF IN ERROR,

v.

DANIEL SAUNDERS.

ABSTRACT, ASSIGNMENT OF ERRORS, AND POINTS FOR PLAINTIFF IN ERROR.

---

2 ## ABSTRACT.

In this case the plaintiff in error was the original demandant, and the Court below ordered a verdict for the tenant, Saunders, at close of demandant's evidence. Consequently we are permitted, and it is more convenient, to state as facts those things which our evidence tended to prove.

The dispute in this case is about a boundary line between adjoining proprietors of mountainous, wild tracts of land in New Hampshire; and involves several thousand acres.

3 Each party holds under the State; and the dispute arises from the fact that the old grant under which Saunders holds, and which was the

elder grant, commences at the corner of the town of Lincoln, which was a fixed, marked monument, and purports to thence run Easterly to an unlocated prior grant, and thence Southerly upon the unlocated grant to a point due North from another fixed, marked monument; while subsequent surveys show, and it is the fact, that every part of the unlocated grant is several miles East of a line running due North from the last named monument.

The unlocated grant is known as "Hart's Location," and was granted by the Royal Governor of New
4 Hampshire to Chadbourne, by instrument dated April 27, A. D. 1772, and found in the record, folios 35 to 41. A copy of the plan referred to in the grant, is annexed to this brief on a reduced scale. This grant extended up the Saco River Valley, to the well-known Notch of the White Mountains; and runs over, or borders upon, some of the highest and wildest mountains in New England.

Both by the plan and the language of this grant, the extreme length was twenty-one hundred eighty-five rods, or less than seven miles; while its length on the face of the earth is, in fact, over thirteen miles, folio 69, Pitman's Ans. 52. This, however,
5 would not alone create any serious difficulty in locating it, as the terminal monuments are well marked and fixed; but the side lines are not shown by any monuments. There are but three courses shown upon the plan, or by the grant, while the river and valley has numerous courses; the courses do not fit the valley, but throw the grant out upon the moun-

tains; the area affords no clue, but falls short about seventy per cent., folio 70, Pitman's Ans. 53; and it is impossible to lay the grant down without a judicial construction, which must be an arbitrary one.

G. W. M. Pitman, who was an experienced surveyor, and acquainted with the neighborhood, folios 59
6 and 60, testifies, folios 70 and 71, Ans. 55, that the grant could not be put upon the ground by the plan; and gives his reasons. On cross-examination, he admits that settlers had long lived upon the grant—perhaps six or seven families; none for a space of four miles, folio 103, Ans. 195; that they had constituted a "political organization," and sent a representative to the Legislature; but on re-direct, folio 146, Ans. 396, and 397, he re-affirms that the location could not be laid down from the grant; that, folio 147, Ans. 398 to 404, the settlements do not extend up the sides of the valley, nor to the limits of Hart's location as mapped out by him, nor within three-fourths of a mile of a
7 "beech tree," which beech tree, other parts of the case show, is the place where Saunders' North line, if extended, would come out to Saco River. Pitman testifies, folios 65 and 66, Ans. 35 to 39, that in A. D. 1859, at the request of Bemis, owner of this "Hart's Location," he undertook to run its exterior lines; that previous thereto, as he thought, they had never been put upon the ground, and he found no indications thereof; that, folio 67, Ans 43 to 45, he run out the location to the width of 470 rods throughout, with 5 courses, and "had no reference to the river, but surveyed the tract in the best shape we could, ac-

cording to the charter as we understood it."
8 Wilkins, who had surveyed in that section for over fifty years, folio 166, says, upon cross-examination by Saunders' counsel, that in A. D. 1850, he run the East line of "Elkins' Grant," (which is the common name of the tract claimed by Saunders), "at the request of Norcross, then one of the owners"; that, folios 176 and 177, "after reaching the North line, he run down to Saco River, or the turnpike", that, folio 181, he met the joint owner of one-half of Hart's Location, who said that "the boundaries of Hart's Location had never been located, and there was not any line there"; and the witness continues, that "we came to the conclusion the location was
9 470 rods wide, and that we should run a line along the course of the river, and should measure off 235 rods on each side."

The copy of the Nathaniel Merrill plan put in per folio 25, and omitted in printing the record per stipulation, folio 34, is another paper plan of this tract; has been laid down on the diagram of comparative lines annexed to this brief; and gives entirely different contour from either the plan of A. D. 1772, or from the running of Pitman, and from that of Wilkins, and also from the lines by Crawford upon the plan made for Saunders, folio 242; which latter lines are also laid down upon the same diagram. All said com-
10 parative lines diverge from each other widely, the divergence in places being over one mile; and none of them have any resemblance whatever to those of the original plan of A. D. 1772.

Therefore, at the time of the grant under which Saunders claims, which we will next describe, this so-called Hart's Location had never, in fact, been located, and could not be located without a judicial construction; all of the four different Surveyors who had attempted to draw or locate it,
11 differed by miles.

The deed from the State, dated August 31, A. D. 1830, of the tract claimed by the tenant, Saunders, and which is commonly known as Elkins' Grant, appears folios 31 to 34, and the Resolve approved July 3, 1830, authorizing the same, appears folios 42 to 46. The language of the deed follows that of the Resolve, and commences at the "North-east corner of Lincoln," (which is also a corner of Franconia) "and running East 7 miles 117 rods to Hart's Location; thence Southerly by the Westerly boundary of said location, to a point so far South that a line drawn thence due South shall
12 strike the North-west corner of the town of Burton," (now Albany); "thence South to said North-west corner of Burton," (which is also the North-east corner of Waterville); "thence Westerly along the Northern line of Waterville," and so on by various metes and bounds to first point.

The corner of Lincoln, or Franconia, was a fixed, marked monument; because Elkins, who is seventy-five years of age, folio 214, and was interested in the grant next North of Elkins' Grant, known as Sargent's Grant, folio 215, was out on the North line of Elkins' Grant, while he lived at Thornton some over forty years ago, folio 215, commenced at Franconia Cor-

13 ner, folio 216, and found that corner marked by yellow birch, folio 227.

The North-west corner of Burton, or Albany, was also a fixed, marked monument. See Pitman's testimony, folios 74 to 76; and also of Wilkins, folios 167 and 168.

All the plans and the testimony in the case show, and it will not be questioned, that upon any construction of Hart's Location, every part of it which lies Southerly of the North line of Elkins' Grant extended, is Easterly of a line running North from the North-west corner of Burton, and that the departure Easterly increases as one follows Hart's Location South-
14 erly. This departure at the North line of Elkins' Grant, according to any construction put upon Hart's Location by any Surveyor, must be at least 626 rods, less 235 rods=391 rods, or nearly one and one-fourth miles. Pitman, folio 83, Ans. 112.

In New Hampshire, "South" and "due South" mean, ordinarily, the magnetic South.

Wells v. Jackson, 47 N. H., p. 235.

The variation of the compass in that locality since A. D. 1832 was about 2½° to 3°, folio 192.

There is a great deal of evidence in the case showing an old, well-marked line, spotted with lot lines on the West towards Elkins' Grant, extending from the
15 corner of Burton North to the North line, and, as we say, the North-east corner of Elkins' Grant. The details of this testimony can be more conveniently stated, at that part of our brief where we argue as to its effect.

A general description of this line is given by Pitman, folios 76 to 80, Ans. 79 to 96. Making allowance for variation of about 3 degrees, this line runs a course which in A. D. 1830 was a due magnetic North (see Wilkins' testimony, folios 169 and 170), and its Northern terminus was shown by a well-marked fir tree, fully described in folio 80. This fir tree, as it appears by Ans. 112, folio 83, was 626 rods from the
16 turnpike near Saco River, as already described. Pitman makes this fir tree something more than eight miles from the corner of Lincoln, folios 94 and 95, Ans. 151 to 156. Elkins knew a fir tree, described to him as the corner of Elkins' Grant, and marked as a corner, folios 218 and 219, which he says, folio 220, was from 7 to 8 miles from Lincoln Corner.

Therefore, taking this fir tree as the North-west corner of Elkins' Grant, and the line running from Burton Corner North to this tree as the Easterly boundary, gives Elkins' Grant all the length on its North line called for in the deed from the State—namely, 7 miles and 117 rods.

The case does not show wherein arose the erroneous theory, that the North line of Elkins' Grant
17 would intersect Hart's Location at a point Westerly of the North-west corner of Burton. It might have been supposed, that Hart's Location was to be run rigidly upon the courses in the old grant, which would have thrown it well over towards Lincoln: or it might have been, that the survey of the towns East of the Saco Valley had not been connected with the surveys of the towns West; and it was therefore sup-

posed the Saco River trended towards Lincoln more than it really did, or that the line running East from Lincoln Corner would strike the river further North,
and thereupon at a point further West, than
18 was the fact.

The error was probably discovered in the surveys made almost cotemporaneously with the Resolve of A. D. 1830, and with the granting of this property; for it had been discovered when the deed from the State under which we claim was given, to wit: November 26, A. D. 1831, folios 27 to 30.

Omitting the courses unimportant to this case, this latter deed runs to "the North-west corner of Burton, being the South-east corner of Jasper Elkins' Grant; thence Northerly on the Easterly line of said Elkins' Grant to the North-east corner of said grant, *thence*
Easterly to Hart's Location, thence South-
19 easterly by said Hart's Location," &c. * *
"Meaning all the public lands not heretofore granted by the State of New Hampshire, South of the road leading through the town of Bartlett to the Notch."

~~Our action was to settle the boundary.~~

PLEADINGS AND ISSUES.

Our action was to settle the boundary

The tenant Saunders disclaimed everything in demandant's writ except what is described in tenant's plea, folio 20; *the pith of which is, that he claims that the Eastern boundary of his tract runs down upon the line of Hart's Location, to a point on that location*

nearest to the North-west corner of Burton, thence to said North-west corner.

By the New Hampshire practice, his plea admits him in possession, claiming the freehold to the extreme boundary named by him; and therefore demandant was entitled to a verdict, whether the boundary was a North and South line from the corner of Burton, or was a line commencing at the point of intersection between the West line of Hart's Location and the North line of Elkins' Grant extended, and running thence from said intersection directly to the corner of Burton.

Demandant claimed:

1st. That by the true construction of Elkins' Grant, its North line stopped at a point North from the corner of Burton.

2d. If the first point was held erroneous, and the Court was compelled to run to Hart's Location, then the Eastern boundary of Elkins' Grant would run from the first point of intersection of its North line with Hart's Location, directly to the corner of Burton.

3d. That under the local practice of New Hampshire, there had been such practical location of the line, as concluded the parties.

The Court, at the close of demandant's evidence, folio 36, took the case from the jury and directed verdict for the tenant; to which procedure demandant was entitled to take a general exception.

ASSIGNMENT OF ERRORS.

1st. That the Court erred in directing a verdict for tenant.

2d. That the Court erred in giving the instruction to the jury marked 2, folio 237.

3d. That the Court erred in giving the instruction to the jury marked 3, folio 237.

4th. That the Court erred in giving the instruction to the jury marked 4, folio 238.

BRIEF.

To avoid any implication, that the matters of fact alleged in ruling marked 2 were true or were conceded, we say:

The evidence we have already recited, was
23 competent and sufficient evidence upon which a jury could properly find, that the grant of Hart's Location was *not* "made upon *actual* survey," and that there were *no* bounds of any survey which could be "recognized and located."

The grant of A. D. 1761, folio 26, does use the word "survey," but also uses the expression "plan or survey,"—showing that the two words were regarded as equivalent. It also uses the word "admeasurement," which contains an implication of an actual survey. Yet the contour of the plan annexed to that grant, and the distances given in the grant itself, are so clearly inapplicable to the face of the earth,
24 even with the most liberal allowances which old

Surveyors could ask, as to positively negative any actual survey.

The Merrill plan spoken of "had *some tendency* to show that the line of the grant was run and marked upon the ground,"—Wells v. Iron Co., 48 N. H., p. 538; but it does not so purport in terms, and therefore its weight as evidence is very feeble, and more than rebutted by the evidence we have recited.

We think the Court was clearly wrong in standing between us and the jury upon this matter of fact; and that this ruling was based upon a misapprehension of the evidence. Otherwise, as the Court seemed
25 to assume that this alleged matter of fact was necessary to its ruling, the fair presumption is that it would have ruled the law as we shall hereinafter explain it.

RULES OF CONSTRUCTION.

The Rules of Construction in New Hampshire seem to be those generally accepted by the legal profession elsewhere.

"The whole language of the deed is to be taken together, and effect, if possible, is to be given to every part." * * "Or, where the language employed is
26 susceptible of more than one interpretation, the Court will look at all the surrounding circumstances, existing when the deed was made, the situation of the parties, and the subject matter of the conveyance."

Bell v. Woodman, 46 N. H., pp. 315–331-2.

The ordinary rule, that the construction in doubtful

cases is against the grantor, does not apply to grants from the State, even of lands.

Case of Alton Woods, 1 Rep. 46 *a*.
Eastern Archipelago Co. v. The Queen, 2 Ellis & B., pp. 906, 7.
Broom's Legal Maxims, p. *540.

Indeed, at common law the rule was reversed, and the language taken most strongly for the King,
27 unless the grant was expressed *ex speciali gratia, certa scientia.*

Blackstone's Com., Book 2, p. *347.

However, this rule, either way, is "a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail."

Kent's Com., Vol. 2, p. *557.

Hart's Location, though a large tract, not run out, and in running which there is so much room for
28 diversity of opinion, may be, in one sense, a monument. Indeed, it is and must be one boundary of our own land; because the deed gives no method of finding any other.

Our point is, that upon the facts shown by us, it is not such monument, as is intended by the maxim that courses and distances yield to boundaries.

In the text books and reports this rule is coupled with the expression, that the monuments are known and fixed.

The rule is, "that known and fixed monu-
29 ments control courses and distances."

Kent's Com., Vol. 4, p. *466.
Baldwin v. Brown, 16 N. Y. Rep., p. 361.
Newsom v. Pryor's Lessee, 7 Wheaton, p. 10.

"The reason why monuments, as a general thing, in the determination of boundaries, control courses and distances, is that they are less liable to mistakes: *but the rule ceases with the reason of it.*"

White v. Luning, 3 Otto, 525.

"*The ordinary rule rests on the presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto.*"

Higinbotham v. Stoddard, 72 N. Y. Rep., p. 98.

30 Where a boundary is inadvertently inserted *or cannot be found,* * * or an adherence to it would defeat the evident intent of the parties," * * "the boundary may be rejected, and the extent of the grant be determined by measurement, or other portions of the grant."

Morse v. Rogers, 118 Mass. Rep., 578.

"A call for a line *not marked, will not control* courses and distances."

Browning v. Atkinson, 37 Texas, p. 633.

In Buffalo, New York & Erie R. R. Co. v. Stegeler & al., 61 New York, p. 348–352, the Court

31 says: "It would be necessary, for the purpose of justifying and sustaining the construction contended for, to sacrifice and defeat the manifest intentions of the parties by the adoption, as the only monument to limit the grant, of the *indefinite and uncertain boundary of the land of a third party mentioned in the deed, unknown, so far as it appears, to either party, instead of the courses and distances* specified therein, *which can be ascertained and fixed with mathematical precision* and certainty.

To the same effect is the well-stated case of Carson v. Bennett, Div. v. Battles, (N. C.) Rep., p. 558.

In McCown v. Hill, 26 Texas, p. 359, this
32 exception to the general rule was applied to the construction of a public grant of a large tract of land, of which one of the courses was "S. 19 W. 860 Varas to the North-west corner of Daniel Monroe's league." Monroe's league was another public grant; and the Court held that, *if his North line was not run and his North-west corner not marked and established on the ground, the distance controlled.*

There are many cases, also, where the intent of the party required, that fixed and visible monument should yield to the courses and distances; and the
33 intent was carried into effect.

Hamilton v. Foster, 45 Me., p. 32.
Higinbotham v. Stoddard, 72 N. Y., p. 94.
Davis v. Rainsford, 17 Mass., p. 207.
White v. Luning, *ante.*
See also Morse v. Rogers, 118 Mass., p. 572.

The following cases exhibit the state of the law of New Hampshire, with reference to the ordinary rule that monuments control courses and distances.
34 In *every* case, the reference was to *marked monuments.*

In Smith v. Dodge, 2 N. H., p. 303, the earliest case in that State, the whole opinion of the Court is as follows: "Whenever, in a conveyance of land, the deed refers to *monuments actually erected* as the boundaries of the land, it is well settled that those monuments

must prevail, whatever mistakes the deed may contain as to the distances between the monuments."

In Bowman v. Farmer, 8 N. H., p. 402, it is said: "What is most material and certain shall con-
35 trol that which is less material and uncertain. Thus a river, a known stream, a spring or a marked tree, * * * will control both course and distance."

In Drew v. Drew & Al, 28 N. H., p. 489, the Court say, p. 497: "The more certain description shall govern, and the less certain be rejected; *that part of the description which best corresponds with the general intention of the conveyance will be retained,* and what is inconsistent rejected; as, for example, bounds and *monuments upon the ground* are preferred to courses and distances."

In Hall v. Davis, 36 N. H., p. 569, it is said "that *boundaries marked on the land,* as being most
36 material and certain, are to govern courses and distances."

In Cunningham v. Curtis, 57 N. H., p. 157, decided in A. D. 1876, Judge Smith said, p. 159: "When courses and distances in a deed are inconsistent with fixed monuments, the latter govern, for the reason that what is most material and certain controls that which is less material and uncertain." * * * "Where land is described in a deed as running a certain distance by measurement to an *ascertained* line, though without a visible boundary, such line is regarded as of itself a monument."

In Enfield v. Permit, 5 N. H., p 280, the line of En-

field was by the grant S. 68° E.; but the proof failed to show that it had ever been located at the time
37 the grant was made of Grantham, bounded on one side "by a line running S. 58° E. by the South line of Enfield." The courses named in these grants left a triangular gore between the grants. The Court said, p. 285: "It is contended that, by a well-known rule of construction, the line of the town of Enfield, and not the point of compass, is to fix the North line of Grantham. *If it appeared that the South line of Enfield was, at the time when the charter of Grantham was made, a known, marked line, which had been previously run out, and monuments erected to*
38 *designate it, it would certainly deserve very serious consideration whether the proprietors of Grantham could not hold to such line.* But it does not appear that when the charter of Grantham was made, the South line of Enfield had been actually located; and there was then nothing to designate it, except the point of compass mentioned in the charter of Enfield. What rule of construction is to apply in such a case, it will be time enough to consider when the proprietors of Grantham, or some
39 person claiming under them, shall see fit to raise the question."

Subsequently in Enfield v. Day, 11 N. H., p. 520, the evidence was fuller than in Enfield v. Permit, *ante*, the opinion of the Court showing that there was now proof of a well-marked line.

It is plain, therefore, that there is no local rule in New Hampshire peculiar to that State.

We are not considering the ordinary case of boundary by a farm or other small tract of land, with
40 reference to which the whole tract is, ordinarily, only a single fixed, visible monument, though its outlines may be somewhat in dispute: but we take the precise case in hand, or the Texas case of McCown v. Hill, *ante*, in each of which the claimed monument was a large tract of wild lands never surveyed, and the boundaries of which could not be ascertained, except by running courses and distances more uncertain than the courses and distances of the tract in question.

ELKINS' GRANT DOES NOT RUN TO HART'S LOCATION.

It is plain, therefore, that the rule about monu-
41 ments is not an arbitrary rule of construction; that an unlocated boundary of a large tract of wild land is not a monument within the rule; that the Court is not compelled by any rule to go to Hart's Location, if, upon a fair reading of the instrument in the light of all the circumstances, that part of the grant was an inadvertence; and that, in determining whether or not it was such inadvertence, there is no rule which arbitrarily compels us to subject courses which can be accurately ascertained, to monuments like Hart's Location, the position of which can only be known by running other courses not
42 only uncertain, but enigmatical.

Three things are clear:

1st. That some part of the language of Elkins' grant must be rejected. This is agreed.

2d. That the Legislature expected, and was endeavoring to limit their grant upon the Eastward, by a line running due South to Burton Corner.

3d. That the Legislature understood, that the North line of Elkin's grant would strike Hart's Location at a point West of a line North from Burton Corner.

And our conclusion is, that the only reason why the Legislature run down on Hart's Location, was to get a line running due South to Burton Corner. In other words, had the Legislature understood that the whole of Hart's Location lay to the Eastward of Burton Corner, the Resolve would have said nothing about Hart's Location, but would have run its 7 miles or its 8 miles to a point due North from Burton Corner, thence South to that Corner, and we therefore say, that by striking out from the grant all those words which are inconsistent with the evident intent of the grant, and by inserting nothing, so that the grant shall read as follows, namely: "beginning at the North-east corner of Lincoln, thence East, thence South to the North West corner of Burton," the great intent of the Legislature appearing upon the face of the grant, to go as far East as the corner of Burton and no further East, is accomplished, without violating any principle of law.

43

44

On the other hand, as to the instructions given by the Court:

1st. They introduce a new principle; and by inserting the words, "to the point nearest to the North West corner of Burton," put something into the grant which

is not there. The common rule is that impossible and inconsistent parts of a grant may be rejected; but we have been unable to find any precedent, which
45 authorizes a Court of Common Law thus to add to it.

2d. The Court's construction not only carries the grant East of Burton Corner; but it carries it as far East as possible, and enlarges the grant as much as it was possible to enlarge it, and thus enlarges and aggravates the loss of land to the State, arising from the defeat of its expectation, that the North line would be cut off by Hart's Location at a point West of Burton Corner.

3d. The Court seems to admit that it is forced to
46 this construction, because it assumes there had been of Hart's Location an "actual survey" by metes and bounds, which bounds can be "recognized and located," folio 237; and because it regarded the rule about monuments as without exception, arbitrary and inflexible, and applicable to this case; while we have shown that the facts were not as stated by the Court, that the alleged monument was more uncertain than courses and distances, and therefore the rule is not pertinent, and that, even when it is pertinent, it is not an inflexible rule, but is to be used only for the purpose of ascertaining the real intent of the deed.

47 It cannot be doubted that Hart's Location, as a boundary, was "inadvertently inserted," and therefore may be rejected, as said in Morse v. Rogers, *ante:* while to insist upon it as a monument is, in the language of Buffalo, New York & Erie R. R. Co. v.

Stigeler, *ante*, "to sacrifice and defeat the manifest intention of the parties by the adoption, as the only monument to limit the grant, of the indefinite and uncertain bounds of the land of a third person mentioned in the deed, unknown, so far as it appears, to
48 either party, instead of the courses and distances specified therein, what can be ascertained and fixed to a mathematical precision."

Moreover, as in this case it is evident there was not the "*certa scientia*" of Blackstone, *ante*, because all parties evidently supposed the whole grant would be to the Westward of Burton Corner, the principle that the construction should be favorable to the State has some application.

THERE WAS ERROR, EVEN IF ELKINS' GRANT MUST RUN TO HART'S LOCATION.

If, however, the Court should decide that the North line of Elkins' grant must run to Hart's Location,
49 we still contest the construction given by the Court below; and claim that the proper construction would be to run direct from the end of the North line where it intersects Hart's Location, to the corner of Burton.

This construction would strike out all the words which are impossible, and no more, namely, the words: "thence Southerly by the Western boundary of said location, to a point so far South that a line drawn thence due South shall strike the Northwest corner of the town of Burton." This construc-

tion has the advantage over that of the Court
50 below, because:

1st. It strikes out what is impossible, while the Court, without any precedent we can find, inserted in the deed what was not there.

2d. Because it avoids, in part, forcing the Eastern boundary line to the extreme East, contrary to the clear expectation of the Legislature; and is not in such violent hostility to the evident intent to reserve to the State the land lying Easterly of Burton Corner.

POSITIONS OF DEFENDANT IN ERROR.

But it is said the grant purports to run by the Western boundary of Hart's Location; and, therefore, that we must run by it for some appreciable distance.

We say, in reply, that while the grant so
51 purports to run by the boundary of Hart's Location, it says in the same breath, and as a part of the same indivisible idea, that this running is to a certain point, which proves impossible; that, plainly, the reason of running upon the boundary was to reach this point; and that to insist upon so running, after the purpose of the running had failed, would be to insist upon the letter when the sense of it had gone.

It is claimed that, in order to get at the construction of the grant, we may reverse to running, and run from Burton Corner to Hart's Location; that, as it is impossible to run North to Hart's Location, the word North may be rejected; and that, therefore, the course

would be from Burton Corner to the nearest point on Hart's Location.

To this we reply:

1st. Courses may be run in a reverse direction; but not for the purpose of changing the true
52 construction of the grant. It can be done only for the purpose of finding a monument, as a Surveyor would reverse his instrument for the same purpose.

This, and nothing more, was done in Coburn v. Coxeter, 51 N. H., p. 158, and in the North Carolina cases cited therein, p. 166.

To take any further license in the use of reversed courses would, in cases easily imagined, entirely change the nature of the grant.

2d. Reversing the courses, and at same time running them, as the Court below did, to the nearest point, is not a fair application of the rule that in running to a swamp or river, or other extensive body, you
53 run to the nearest point.

Coburn v. Coxeter, *ante*, p. 165.

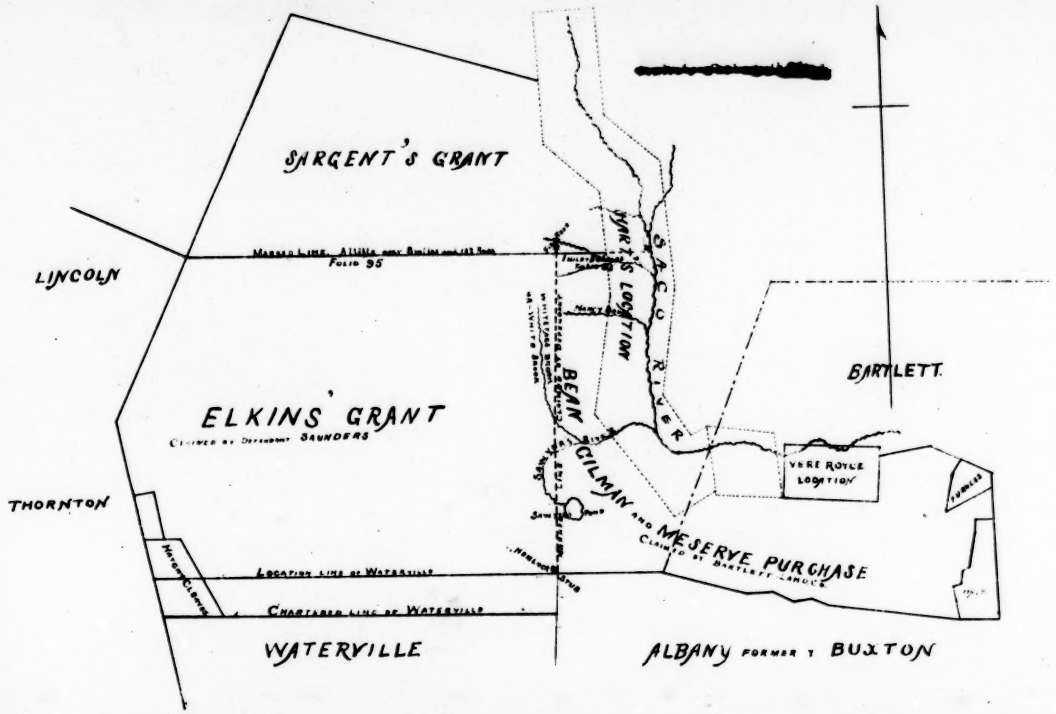
The two rules are admitted. Each, standing by itself, is perfectly plain, practical and just. In Coburn v. Coxeter, *ante*, they were cited separately, as separate rules; and, indeed, in that case the course was reversed, a monument thereby found, and the rule of running to the nearest point on an extensive boundary wholly rejected for the purposes of that case.

In the case at bar, the Court combined the two rules, for which neither Coburn v. Coxeter, *ante*, nor any of the cases cited in it, is a precedent; and thereby did great injustice, and carried to the utmost extent its defiance of the evident expectation of the grant, that the whole tract was Westward of Burton Corner.

WILLIAM L. PUTNAM,

of Counsel.

BERRY, PRINTER, PORTLAND.


SARGENT'S GRANT
LINCOLN
Marked Lime Attilla and Smiths and Ash Trees
Folio 95
ELKINS' GRANT
Claimed by Defendant SAUNDERS
THORNTON
Location Line of Waterville
Chartered Line of Waterville
WATERVILLE
York's Location
Saco River
Bean
Gilman and
Meserve Purchase
Claimed by Bartlett - Jones
Vere Royle Location
Bartlett
ALBANY formerly BUXTON

Supreme Court of the United States.

No. 251.

THE BARTLETT LAND & LUMBER COMPANY,

Plaintiff in Error,

vs.

DANIEL SAUNDERS.

---

or to the United States Circuit Court for the District of New Hampshire.

BRIEF FOR PLAINTIFF IN ERROR.

—BY—

OSSIAN RAY, of Counsel.

WASHINGTON, D. C.:
R. O. POLKINHORN, PRINTER.
1881.

In Supreme Court of the United States.

No. 251.

The Bartlett Land and Lumber Company, *Plaintiff in Error*, *vs.* Daniel Saunders.	In error to the United States Circuit Court for the District of New Hampshire.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

1. The plaintiff's writ is dated November 23, 1875, was returnable before the Circuit Court. held at Plymouth, for and within the Eastern Judicial District of Grafton county, New Hampshire, on the first Tuesday, (being the first day) of May, 1876. The cause was duly removed from said State court, and entered in the United States Circuit Court for the district of New Hampshire, on the eighth day of May, 1876, (being the first day of the term), at which time the plaintiff filed in court certified copies of his writ, and all other papers on file and of record in said State court, together with the order of said State court for the removal into the United States Court. Folios 1 to 19. The value of the demanded premises at the time of the commencement of the suit, and at the trial, exceeded five thous-

and dollars. See stipulation, folio 235. The plans of Pitman and Crawford, or copies on a reduced scale, by agreement are made a part of the record to be used in the argument, as chalks merely of the land in controversy and the adjacent grants. Folio 242.

2. The plaintiff in his writ demands against defendant a tract of land bounded as follows: "Beginning at the northeast corner of the town of Albany, thence running north about 3° east three miles and sixty-five rods to a spruce tree, marked; and from thence north about 6° east four miles and ninety-five rods to a fir tree, marked; and from thence south about 87½° east to the westerly line of Hart's location and to the easterly line of Grafton county, as established by the act approved July 3, 1875, entitled 'An act establishing the east line of Grafton county;' and from thence along the east line of Grafton county to the bound begun at, and containing eight thousand acres of land, more or less." Folio 4.

3. Defendant disclaims all of the demanded premises not included in his plea. By his plea the defendant comes and defends his right to so much of the demanded premises as is included within the following description: "Beginning at the northwest corner of the town of Albany, formerly called Burton, and thence running north about 3° east three miles and sixty-five rods to a spruce tree, marked; and from thence north about 6° east, four miles and ninety-five rods to a fir tree, marked; and from thence south about 87½° east to the westerly line of Hart's location; thence southerly by the westerly line of Hart's location, *to the point in said westerly line nearest* to the northwest corner of said Albany; thence in a straight line to the northwest corner of said Albany." Plaintiff accepts all that portion of the demanded premises which defendant disclaims, and plaintiff joins issue upon defendant's plea of *nul disseizin*. Folios 21, 22, 23.

4. The cause was tried before Clark, District Judge, and a jury, May term, 1878, (folio 24.) When plaintiff rested his case, defendant's counsel moved that the court instruct the jury to return a verdict for defendant, and the judge so ordered, after making the following rulings:

(1.) "That in the construction of deeds, monuments fixed and certain, or which can be made fixed and certain, will govern the course and distance."

(2.) "That Hart's location having been originally granted by a deed or grant made upon an actual survey by metes and bounds, which bounds can be recognized and located, and having long been occupied by settlers, and surveyed and recognized by the Government of New Hampshire, is such a monument, and will control the distance given in the line running east on the north side of the Elkins' grant, notwithstanding the exterior line of Hart's location is not shown upon the ground at the point where the north line of Elkins' grant running east would strike it."

(3.) "That, by the true construction of the Elkins' grant, the line runs on the northerly side east to the westerly side of Hart's location; thence southerly by Hart's location to the nearest point to the north-west corner of Burton, (now Albany.)"

(4.) "That there is no evidence before the jury to estop or bar those claiming under the Elkins' grant from maintaining that line; and that upon the case, as it now stands, the demandant is not entitled to recover." Folios 236, 237, 238.

Plaintiff's counsel seasonably excepted to said instructions and order, which exceptions were allowed. Folios 238, 239. Pursuant to the Court's instructions, the jury returned a verdict for the defendant. Folio 240.

5. The plaintiff's tract is called the Bean, Gilman and Meserve Grant or Purchase. It was duly conveyed by

James Willey, the New Hampshire Land Commissioner, to Bean, Gilman and Meserve, November 26, 1831, by virtue of a resolution of the General Court of New Hampshire, passed June 22, 1831. The description is as follows: "Beginning at the southwest corner of Hale's location, on Burton north line; thence westerly on said Burton north line, *to the northwest corner thereof, being the southeast corner of Jasper Elkins' grant; thence northerly on the easterly line of said Elkins' grant, to the northeast corner of said grant; thence easterly* to Hart's location; thence southeasterly by said Hart's location and the ancient southerly line of the town of Bartlett to the northwest corner of Furnace's location; thence southerly on said Furnace's west line to the southwest corner thereof; thence easterly on said Furnace's south line to Conway west line to a hemlock tree, being the southeast corner of said Furnace's location; thence southerly on the west line of said Conway to the northeast corner of said Hale's location; thence westerly on said location to the northwest corner thereof; thence southerly on the west line of said location to the first mentioned bound; *containing sixteen thousand acres, be the same more or less, meaning all the public land not heretofore granted by the State of New Hampshire, south of the road leading through the town of Bartlett to the Notch.*"

Plaintiffs showed title in themselves to the above tract by proper conveyances from the grantees of said Bean, Gilman and Meserve. (Folios 24 to 29.) Many of the deeds in plaintiff's chain of title are omitted from the record by consent, (Folio 25) but the deeds (1) Bean, Gilman and Meserve to Harrington, (2) Harrington to Harrington and Forbes, (3) Lyford to Forbes, in their title, are given. (Folios 46 to 57.)

6. The tract claimed by defendant is known as the Elkins' grant, and was conveyed by Abner B. Kelley, Treasurer of New Hampshire, to Jasper Elkins and others, Au-

gust 31, 1830, pursuant to a resolution passed by the General Court of that State July 3, 1830, and is described in the deed as follows: "Beginning at the *northeast corner of the town of Lincoln and running east seven miles and one hundred and seventeen rods* to Hart's location; *thence southerly* by the westerly boundary of said location *to a point so far south that a line drawn thence due south shall strike the northwest corner of the town of Burton; thence south to said northwest corner of Burton;* thence westerly along the northern line of Waterville to the eastern boundary of Hatch and Cleaves' grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln, and along this line to the point first mentioned." Defendant claims title from the grantees of said Jasper Elkins and others. (Folios 25, 31, 32, 33, 42, 43, 44.)

7. Both parties claim under grants from the State of New Hampshire, the defendant's being earlier in time.

8. Both grants in terms purport to run east or easterly to Hart's location, so called, the charter of which was granted by King George III, through the advice of his last royal governor of New Hampshire, John Wentworth, Esquire, to his loving subject, Thomas Chadbourne, of Portsmouth, in the Province of New Hampshire, gentleman, on the 27th of April, 1772. The description contained in this charter of Hart's location is as follows:

"A certain tract or parcel of land *containing by admeasurement three thousand acres*, situate, lying and being in our province aforesaid, *as by a plan or survey thereof, exhibited by our Surveyor General of lands*, for our said province, by our said Governor's orders, *and returned into the Secretary's office* of our said province, *a copy whereof is hereunto annexed*, may more fully and at large appear, butted and bounded as follows, viz: Beginning at a birch tree, being

the south westerly bounds of a tract of land granted to Mr. Vere Royse; from thence running north four hundred and seventy rods, *from thence extending westerly the same breadth of four hundred and seventy rods, the distance of two hundred and eighty-five rods*, from thence running northwesterly six hundred rods, from thence running nearly a north course thirteen hundred rods, until it meets the notch or narrowest passage leading through the White mountains, lying upon Saco river." (Folios 35 to 40.)

9. A fac-simile of the original charter plan of Hart's location, is the first one appended to Mr. Putnam's brief for plaintiff.

10. The Nathaniel Merrill plan, so called, of Hart's location, a copy whereof is appended to Mr. Putnam's brief, and also to the brief of counsel for defendant, is supposed to have been made under the provisions of an act passed by the General Court of New Hampshire, December 30, 1803, and the amendment thereto, adopted June 18, 1805, by which the several towns were directed to cause surveys of their boundaries to be made, and to forward maps to the office of the Secretary of State, before or on the first Wed day of November, 1805. Folios 25, 26, 108, 109.)

11. The northeast corner of Lincoln, being the northwest corner of defendant's tract, also a corner of Franconia, and of Sargent's grant, is a well known monument, *marked and defined upon the ground.* (Elkins, folios 216, 227.) The northwest corner of Burton, (now Albany,) being the southeast corner of defendant's tract, is an equally well known monument, *also marked and defined upon the ground.* Elkins, folios 222, 223, 225, 226; G. W. M. Pitman, folios 74 to 76, Wilkins, folios 167, 168, 174; Rodgers, folio 195; Pierce, folios 204 to 212; Jos. Pitman, folios 155, 156. The north line of the defendant's tract is *a well known line, defined by marked or spotted trees, from the northeast corner of Lin-*

coln to the fir tree. Elkins, folios 216, 227; Pitman, folios 94, 95; Wilkins, folios 172, 180. All this is conceded by defendant.

12. The boundaries of Harts' location were never put upon the ground, according to the charter plan, or the Merrill plan, by anybody. No monuments indicating the side lines of Hart's location, following the charter, or either of the plans, were ever marked or erected. G. W. M. Pitman, folios 65 to 70. Pitman's survey of this tract, in 1859, for Dr. Bemis, who claimed to own it, giving the location a uniform width of four hundred and seventy rods its entire length, laying it out "in the best shape we could," (folio 67,) without following or attempting to follow the plan annexed to the grant, folio 106, (See Pitman's plan, annexed to Mr. Putnam's brief), is immaterial in determining any matter now in controversy.

13. On the easterly side of Elkins' grant, between the old hemlock (the northwest corner of Albany) to the fir tree corner (six hundred and twenty-six rods westerly from the Saco River turnpike, and a little over eight miles easterly from the northeast corner of Lincoln), there is an old, well-marked line, extending the entire length, north and south, of Elkins' grant. It has been respotted two or three times. The land in Elkins' grant has been lotted to this line on the west side, and the land on the east side of this line has not been lotted.

The age of the oldest marks on this line, ascertained by cutting chips out of the spotted trees and counting the grains, in 1875 and 1876, appears to have been forty-five and forty-six years respectively. Pitman, folios 87, 88, showing the line to have been made in 1830, the year of the grant to Jasper Elkins and others. This line was evidently spotted before the Land Commissioner's deed to Bean et al., November 26, 1831.

Our witness, the old man, Daniel Elkins, (son of Jasper Elkins, a grantee named in the State Treasurer's deed of defendant's grant,) in his testimony relates what was said by Sargent and Cummings as to how and when the fir corner was made. Folios 217, 218. The same witness also relates what was said by Cummings, the surveyor, in presence of Walker and Sargent, who were also original grantees of defendant's tract, at the Albany corner, in relation to making the southeast corner of Elkins' grant at that hemlock tree, and running the east line of Elkins' grant. Folios 222, 223, 225, 226.

The original grantees of defendant's tract and Jonathan Cummings, their surveyor, were all dead long before the trial. (Folios 168, 214.) The evidence clearly tends to show that the original grantees of defendant's tract located and established the eastern boundary of their tract by the line made by themselves or their own direction, between the northwest corner of Albany and the fir-tree corner before named.

14. After this was done the State authorities and the original grantees of plaintiff's tract, understanding and believing (as we say) that Elkins' grant had been definitely located upon the ground, and understanding and believing that, by any fair survey of Hart's location upon the ground, its westerly boundary would not abut against said easterly line of Elkins' grant, but that a strip of land of considerable width remained ungranted between Elkins' grant and Hart's location, negotiated the trade resulting in the conveyance thereof to Bean, Gilman & Meserve, November 26, 1831. The testimony of James Rogers, (folios 194 to 198,) shows the State, by its agent, Land Commissioner Willey, in possession of the demanded premises, tracing said east line of Elkins' grant, it having been spotted a year or two apparently, and making a survey for the purpose of conveying the plaintiff's tract to Bean, Gilman & Meserve.

Assignment of Errors.

1. The court below erred in directing the jury to return a verdict in favor of the defendant.

2. The court below erred in giving the second instruction to the jury. Folio 237.

3. The court below erred in giving the third instruction to the jury. Folio 237.

4. The court below erred in giving the fourth instruction to the jury. Folio 238.

5. The court below ought to have submitted the cause to the jury with instructions that they might find a verdict for the plaintiff upon the evidence contained in the record for the whole of the demanded premises. (1.) Upon the ground that there had been a practical location of defendant's tract, bounded easterly by the line between the northwest corner of Albany and the fir tree. (2.) Upon the ground that said easterly line had become established by agreement or by acquiescence. (3.) Upon the ground that defendant's grantees had abandoned so much of their tract as lay easterly of said line, if any, and the State of New Hampshire, by its agent, with the assent of said grantors, or with their knowledge and without objection on their part, had re-entered and conveyed the demanded premises whereby defendant is estopped to claim the same.

6. The court below erred in not directing a verdict for the plaintiff.

Brief of the Argument.

The defendant's grant, being first in time, our case turns upon the point whether that grant,—both upon the true, legal construction of the instrument itself, in the light of conceded facts, and upon all the facts which the testimony

contained in the record tends to prove, or which a jury might properly find from that testimony,—covers the demanded premises wholly, or in part.

I.

The court below erred in construing the grant. Where a grant cannot be run out, so as to accord *exactly* with the description, it must be run so as to conform thereto, "*as near as may be.*"

Marshall, C. J., in *McIver* v. *Walker*, 9 Cranch, 179;
Nichols v. *Turney*, 15 Conn., 102, is directly in point.

See instructions of court, p. 107 and opinion pp. 109—110.

II.

We do not question the general proposition laid down by the court below, "that in the construction of deeds, monuments fixed and certain, or which can be *made* fixed and certain, will govern the course and distance." Folio 236.

But the *object* of this rule, as with all other rules of construction, is to get at the intention and understanding of the parties, if the words will admit of it. It is not inflexible. To this, as to all general rules, there are many exceptions.

White v. *Luning*, 93 U. S., 514;
Coburn v. *Coxeter*, 51, N. H., 158;
Davis v. *Rainsford*, 17 Mass., 207;
Parks v. *Loomis*, 6 Gray, 467;
Murdock v. *Chapman*, 9 Gray, 156;
Thatcher v. *Howland*, 2 Met., 41;
Railroad v. *Stigeler*, 61 N. Y., 348;
Townsend v. *Hoyt*, 51 N. Y., 656.

"The *reason* of the rule is that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses and distances are more probable and more frequent than in *marked trees, mountains, rivers,* or *other natural objects capable of being clearly designated and accurately described.*"

Marshall, C. J., in *McIver* vs. *Walker,* 9 Cranch., 178.

This, variously expressed, is given in *all the cases,* as the reason of the rule. It is substantially that in the description of land, that which is more certain shall prevail over that which is less certain.

Nowhere, perhaps, is it better stated than in *Hall v. Davis,* 36 N. H., 571, where FOWLER, J., says: "In the description of a line what is most material and certain shall control that which is less material and uncertain,—boundaries marked in the land as being the most material and certain are to govern courses and distances. If the plan or the line described in a deed or charter, and the monuments made by an original survey of a tract or township of land, do not correspond, the monuments are always to determine the true location, and the marks on the ground of an old survey indicating the lines originally run, are the best evidence of the true location of that survey."

Chinoweth vs. *Haskell's Lessee,* 3 Peters, 96;
Pernam vs. *Wead,* 6 Mass., 133;
Jackson vs. *Loomis,* 18 Johns., 86;
Belden vs. *Seymour,* 8 Conn., 25.

But "the rule ceases with the reason for it."

White vs. *Luning,* 93 U. S., 525;
Railroad vs. *Stigeler,* 61 N. Y., 348, and other cases cited on page 10.

Where a monument is referred to in a deed, for example a line of another tract, as in this case—which is not at the date of the deed marked upon the ground, and which

can be fixed and identified only by the courses and distances mentioned in the descriptive part, such monument, manifestly, is no more certain than the boundaries defined by the courses and distances given in the deed which is to be construed. Hence we find in *all the cases* where it is held that the line of another tract, referred to in a deed, is a monument controlling the courses and distances mentioned, such line is *always a known line*, already marked upon the ground, or a line so defined by objects or monuments upon the ground, that by them it is (or may be made) fixed and certain,—by them may be certainly located and marked upon the ground.

Enfield vs. *Permit*, 5 N. H., 285;
Morse vs. *Rogers*, 118 Mass., 578.

"When the monument cannot be found, and (or) its location cannot be made certain, *the measurements and other provisions of the deed must be resorted to.*"

Wilson v. *Hildreth*, 118 Mass., 578–582.

"When the monument is not found, nor its *location* or existence proven, the lands must be located by the other parts of the description."

Drew vs. *Swift*, 46 N. Y., 204.

"Courses and distances yield to *known*, *visible* and *definite* objects, but they do not yield unless to calls more material and equally certain."

Shipp v. *Miller*, 2 Wheaton, 316;
Johnson v. *Pannel*, 2 Wheaton, 206.

"Monuments can only govern where they are clear and settled, and not when there is a dispute about the monuments themselves, and whether or not they are in the right place."

Hathaway v. *Evans*, 108 Mass., 269. (Instructions to jury as above held correct.)

In order that a line so referred to may constitute a monument controlling courses and distances, it must be a line capable of being located and made certain, *without regard to, and independent of course and distance.* This is common sense, as well as the doctrine of all the authorities. It is believed no case can be found to the contrary.

That a monument referred to in a conveyance, which is unfixed and uncertain, and which cannot be made certain, *will control neither course nor distance*, is implied in the general proposition, is plain upon general principles, and is sustained by the weight of authority. The less certainty must yield to the greater, (*Chinoweth* vs. *Haskell*, 3 Peters, 96; *Benedict* vs. *Gaylord*, 11 Conn., 335; and cases before cited; 6th Mass., 133; 9 Cranch, 178; 18 Johns., 86; 8 Conn., 25,) and hence where the monument referred to cannot be located, the course and distance necessarily must control. As, for example, where the monument was a birch tree, unmarked among numerous other trees of the same kind, and could not be identified.

Greenup vs. *Lyne*, 2 Bibb, 369;
Alshire vs. *Hulse*, Wright (Ohio), 171.

So, when the monument called for was "two small chestnut oaks," not otherwise distinguished in a wilderness where there were many such.

Chinoweth vs. *Haskell*, 3 Peters, 88, where Marshall, C. J., pp. 97—8, says: "where are we to look for these two small chestnut oaks in a wilderness, * * * * or how are we to distinguish them from other chestnut oaks? The guide and the only guide given us by the survey or by the grant is the course and distance."

Where the monuments called for did not exist, the course and distance govern.

Seaman vs. *Hoyeboom*, 3 Barb., 215;
S. C., 21 do., 398.

Quantity also, which is generally controlled by distance, if definitely expressed, will control when the distance is left uncertain, as by the expression, "six chains or thereabouts."

Jackson vs. *Zimmerman*, 2 Caines, 146.

Course and distance will govern where the monuments referred to in a deed "are lost, and the place where they originally stood cannot be ascertained."

MELLEN C. J., in *Linscott* vs. *Fernald*, 5 Greenl., 496–503, cited and approved by Walworth, Chancellor, in *Tymason* vs. *Bates*, 14 Wendell, 677.

In the last case, the deed called for, among other courses, the following: "Thence north 38°, east 30 chains and 50 links, to a *crooked beech tree marked 1 and 2*,—thence," (by a certain course,) "to the bounds of lot 59, an iron-wood sapling and basswood tree near it marked 1 and 2;" *held* that if the monuments referred to could not be found, then the courses and distances named in the deed would govern.

Ibid., pp. 680–681.

Generally, monuments will prevail over the number of the lot.

Jackson vs. *Loomis*, 18 Johns., 81;
Jackson vs. *Clark*, 7 Johns., 223; (Star p.)
Washington vs. *Hylyer*, 4 Mass., 196.

But when a practical location has been made by the parties, as where the grantee has entered upon the land as described by number, and possessed the same for several years, the number is held to control the monuments.

Lush vs. *Druse*, 4 Wendell, 313.

Between course and distance there is no rule that one shall be preferred to the other, because one is no more certain than the other.

Preston vs. *Bowmar*, 6 Wheaton, 580.

Whether a monument called for in a deed is fixed and certain, or capable of being made so, is always a question for the jury.

Wendell vs. *The People*, 8 Wendell, 183, 190–1.

In this cause plaintiff's evidence tended to show—

(1.) That Hart's location never was, in fact, laid out upon the ground (Record folios 65, 66, 101, 181), and—

(2.) That it could not, from the grant and plot, be so laid out. (Folios 70, 71, 106, 147.)

This is apparent from the terms of the grant (folios 36, 37), and the plan therein referred to. But for the plan the grant would be clearly void for uncertainty, and the terms of the grant are wholly inconsistent with the plan. The plan does not extend Hart's location to "the notch or narrowest passage leading through the White Mountains" by nearly seven miles. (Folios 145, 146.) It is doubtful which should control—the grant or the plan. Therefore, the plaintiffs were clearly entitled to have the question whether the line of Hart's location was a certain and fixed monument, or otherwise, submitted to the jury; and if the jury found it was not, then the northerly line of Elkins' grant would be fixed and determined by the course and distance, "east seven miles and one hundred and seventeen rods," and the next call in the defendant's grant "to Hart's location, and thence southerly by the western boundary of said location," must be rejected as false or mistaken.

Indeed the jury might have found that the fir tree (folios 80, 81), was, in fact, at or "on the line of Hart's location," and that the western boundary thereof extended from the fir tree southerly by the marked line to the point sixty or seventy rods north of Sawyer's River, about three-and-one fourth miles from Burton Corner—that this was the point from which a line running due south would strike Burton Corner (folios 78, 79, 80). It is noticeable that, taking into

account the variation of the compass, the course from this point, three-and-one-fourth miles to Burton Corner, was, in 1830–1831, exactly *due south*. (Folios 82, 170, 192.)

The record shows absolutely, at all events there is abundant evidence tending to show, that the western boundary of Hart's location is vastly more uncertain than the eastern boundary of Elkins' grant as fixed by the course and distance.

1. At the date of Elkins' grant, the westerly line of Hart's location was not marked upon the ground. (Folios 65, 66, 101, 181.) It has, in fact, never been surveyed and marked upon the ground.

2. The grant, or charter, of Hart's location, but for the plan therein referred to, is manifestly void for uncertainty. Upon the language of the grant it is plainly impossible to locate the land intended to be conveyed.

3. *It is certain that Hart's location can only be located upon the ground by the courses marked upon the plan and the distances there given according to the scale upon which the plan purports to be drawn*, viz: 100 rods to the inch.

4. Neither courses nor distances are named specifically, or in terms, *i. e.* are not set down in *words and figures*, upon the plan, and herein are two additional and very great liabilities to error and mistake. Both courses and distances depend entirely—

(*a.*) *Upon the accuracy upon which the plan was made;*

(*b.*) *Upon the accuracy with which they can be taken from the plan, and put upon the ground.*

The place, the situation therefore, of the western boundary of Hart's location, upon any view that can be taken, is vastly more indefinite, uncertain and doubtful, than the point seven miles and one hundred and seventeen rods distant from the northeast corner of the town of Lincoln, in a

line running east therefrom. The northeast corner of Lincoln is conceded to be a well known bound. The point seven miles and one hundred and seventeen rods, along the northerly line of Elkins' grant, easterly from said corner of Lincoln, may be ascertained with absolute certainty, so far as course and distance can make it certain. The locality of the western boundary of Hart's location could be ascertained with no *greater* certainty if the courses and distances, were expressed in words and figures with equal plainness.

Surely if the well settled doctrine that "the more certain description shall prevail over the less certain," is correct, there is no escape from the conclusion that the northeast corner of Elkins' grant must be fixed by the course and distance therein specified, and that it is therefore either at the "fir tree," at the point marked A on the plan appended to this brief, or westerly thereof, at a point exactly seven miles and one hundred and seventeen rods east of said Lincoln corner.

5. But, as stated by Mr. Pitman, surveyor, in his testimony (folios 71, 106, 107, 147), taking the language of the grant and the plan together—that is to say, upon the whole instrument—Hart's location cannot be located at all; for

(*a*.) The monument, to wit: "the notch or narrowest passage," etc., controls the courses and distances specified upon the plan, and obeying that call necessarily changes all the courses and distances marked upon the plan, thus making them wholly indefinite and uncertain. According *to the plan* the northerly line of Hart's location is some four or five miles south of the "notch or narrowest passage," etc., (folio 147); as we make it, by comparing the plan with Pitman's survey, and also with Crawford's, exactly four miles and sixty-six rods. In short, in order that the grant of Hart's location may be located *by any possibility anywhere*, the monument called for by the terms of the grant,

to wit: "the notch or narrowest passage," etc., must be rejected.

(*b.*) There is nothing whatever contained in the charter, (folios 36, 37,) or in the plan—see first plan appended to Mr. Putnam's brief—or in both together, to support the theory that the grant is to be located according to the survey of Pitman in 1859 (folios 65, 66, 67), or the survey of Crawford, pursuant to his plan. There is nothing in the description of the grant of Hart's location indicating that it was to be four hundred and seventy rods wide throughout its entire length; and the plan shows clearly and distinctly that the width ("breadth," the plan says) of four hundred and seventy rods at the lower end of the location extends therefrom only the distance of two hundred and eighty-five rods westerly. Beyond the two hundred and eighty-five rods, Hart's location, according to the plan, is not half the width of four hundred and seventy rods.

Upon the evidence, then, the assumption of the court below contained in the second instruction to the jury (folio 237) was entirely unwarranted. Whether Hart's location was "originally granted by a deed or grant made upon an actual survey by metes and bounds, which bounds can be recognized and located," and whether it has been or was, at the time referred to, "surveyed and recognized by the government of New Hampshire," *was a question for the jury*. The refusal to submit this question, with suitable instructions, to the jury by the court below was palpably erroneous, and is revisable here.

It is observable that there is nothing in this grant showing that there was an actual survey thereof before or at the time of the grant. The language used is, "as by a plan *or* survey thereof," etc., which is entirely consistent with the idea that there was nothing but the plan, made without any actual survey of the land. The correctness of this view, in the light of all the circumstances, is quite certain.

III.

A line agreed upon between the parties by parol is conclusive upon them and all claiming under them, by the law of New Hampshire, though it differs altogether from the true line called for by the deed and the known monuments therein specified.

The earliest reported New Hampshire case on the subject is *Carrier* vs. *Basset*, Smith (N. H.,) 191, wherein it was held, in 1808, (JEREMIAH SMITH, C. J.,) that towns may agree on divisional lines so far as jurisdiction is concerned. The plaintiff in that case was not permitted to show what the true charter line, fixed by specified monuments between the towns, really was.

The next case is *Sawyer* vs. *Fellows*, 6 N. H., 107, decided in 1833, in which the court says: "We consider the law settled that when the owners of adjoining lots agree (by parol) to a particular line as the dividing line between them, the agreement is conclusive against them and all persons claiming under them." In this case the line was submitted by parol to a surveyor, who run it out, and the parties set up stakes and built a fence thereon, and the holding was that as against the line so fixed by agreement the true line, however plainly and certainly shown by monuments or otherwise, cannot be shown. To this doctrine the courts of New Hampshire have always adhered.

Two years later, in 1835, comes the case of *Enfield* vs. *Day*, 7 N. H., 457. There the plaintiff's southerly boundary, by its charter, dated in 1761, was a line running from the corner of Lebanon south 68° east 6 miles. The defendant claimed under the proprietors of Grantham, whose northerly line, by their charter, dated in 1767, was a line running from the same corner of Lebanon south 58° east *on the line of Enfield*. The plaintiff claimed to hold by adverse possession for more than twenty years, and the

only question submitted to the jury was whether it had held such possession. There was also some slight evidence tending to show an agreement between the plaintiff and Grantham to the line running south 68° east. The Court set the verdict aside for misdirection to the jury on the question of possession. Touching the agreement claimed by the plaintiff, the Court says: (pp. 467–8.) "It is without doubt true that the proprietors of the two townships were competent to settle the boundary line between them, and if, at any time, they made an agreement which settled the line, they were bound by it. But whether they had made such an agreement was a matter of fact to be left to the jury. Possession up to the line is not such an agreement. Disclaiming all beyond the line is not such an agreement. These are only evidence from which a jury may infer such an agreement. This question was not submitted to the jury."

In 1836, we have the case of *Eaton* v. *Rice*, 8 N. H., 378, where it was held that instructions to the jury, "that if the parties had agreed upon a line, (by parol) they were bound by the agreement," were correct. Says RICHARDSON, C. J., p. 381: It is now a well settled rule in this State, that a line may be established by parol agreement, so that the parties and all claiming under them will be forever bound by it." It was also there held that, "where one of two owners sees the other erect a permanent fence between their lands, without making any objection," this is very strong evidence of an agreement on his part that the fence is erected on the true line.

Here there is evidence that the defendant, Saunders' grantors marked the line we claim to, as their boundary line—that the State not only made no objection to it, but adopted it, and conveyed the Bean, Gilman and Meserve tract according to it.

In *Gray* v. *Berry*, 9 N. H., 473, decided in 1838, the

question was again fully considered by the court, and it was again solemnly decided that a parol agreement between adjoining owners establishing the boundaries of their lots when executed, (that is when monuments are set upon it and possession taken accordingly,) will be conclusive upon them and upon all claiming under them as to the lines of their lots.

It is immaterial whether the true line is certain and fixed by monuments or not.

In answer to the objection that this doctrine was in violation of the statute of frauds—enabling parties to convey lands by parol—the court say: (p 477,) "this agreement passes no interest in lands," and, quoting from SAVAGE, C. J. in *Kip* v. *Norton*, 12 Wend., 127,—"Not that the title to the lands passes by the parol agreement, but the party making the agreement is not permitted to bring an action in violation of it." (p 476.)

In *Jones* v. *Dewey*, 17 N. H., 596, (1845,) the instructions to the jury were: (pp 597, 598) "that *whatever might have been the rights of the parties under their deed*, yet if they agreed (by parol) upon referees to establish bounds and lines between them, and agreed that the bounds and lines so established should be the bounds and lines ever after, then such lines and bounds would govern them in this trial;" and they were held correct. WOODS, J., after stating the doctrine and citing authorities, says: (pp. 598, 599) "It is not because the effect of such a proceeding (*i. e.*, the agreement by parol to refer, etc.,) is to pass the title to any portion of the soil that may lie between the conventional and the true lines in case they should fail at any particular point to coincide, but because, where the parties have agreed upon a line, it is inequitable to permit either of them to act contrary to the effect and true object of the agreement."

They are estopped.

In *Prescott* vs. *Hawkins*, 12 N. H. 19, decided in 1841, the doctrine is recognized and re-affirmed by PARKER, C. J., p. 27.

Again in *Clough* vs. *Bowman*, 15 N. H., 504–11, in 1844.

So, in *Russell* vs. *Allard*, 18 N. H., 222, decided in 1846, one Thomas Russell held the plaintiff's agreement in writing to convey to him a certain lot, and entered into an agreement in writing with the defendant, to refer the question of the line between this and the defendant's lot to arbitrators, who, upon a hearing decided in favor of the defendant. The plaintiff was present at the hearing and did not object, and in this suit the defendant contended that the arbitration and award were binding upon the plaintiff by reason of his presence without making objection. The Court instructed the jury "that it was competent for them upon all the evidence to decide whether or not the plaintiff did assent to the reference of the matter in dispute, and that if he did so assent he was bound by the award." These instructions were held correct.

In *Hobbs* vs. *Crane*, 22 N. H., 130–131, decided in 1850, it was held that "a boundary line run out and established by a surveyor in pursuance of a (parol) agreement of the parties is conclusive upon them." "That a long continued occupancy up to such a line is evidence from which a jury may infer such agreement." In this case the line fixed varied materially from that in terms specified in the deed.

Orr vs. *Hadley*, 36 N. H., 575, decided in 1858, reaffirms this doctrine.

In *Berry* vs. *Garland*, 26 N. H., 473, decided in 1853, the Court instructed the jury that although Nathan Hoit's "*pitch*" *did originally include the locus in quo*, and his deed to Watson did convey to him two-thirds of the land in question, yet if the committee, in 1809, undertook to sever the land of Joseph Hoit and Watson from the lands of the proprietors, and bounded Watson by the waters of the

pond at high water mark, and Watson agreed to the location, and took his proportion of the pitch, without that portion covered by the water, and all the parties were there satisfied with the agreement, then Watson was bound by that line and so were his grantees, and although Watson might afterwards convey the flats, (the part covered by water in 1809) to the plaintiff, nevertheless, the plaintiff, as well as Watson, was concluded by the line fixed by the committee and the parties in 1809, and these instructions were held correct. WOODS, J., says: "Such agreement cannot have the effect of a conveyance of lands, but only of conclusive evidence of the extent of the titles of the respective parties, and their grantors."

In other words, the parties are *estopped to claim* beyond the line agreed upon.

Orr vs. *Hadley*, *ubi supra*, is to the same effect.

Whitehouse vs. *Bickford*, 29 N. H., 471, (1854.) Here was no ambiguity or uncertainty in the true line called for in the charter—a straight line between two well defined monuments,—and it was decided that the parties might agree by parol upon a different line, and that such agreement was binding upon them and all claiming under them. WOODS, J., (pp. 478–479,) says: "In this State the parol agreements of adjoining owners of lands, fairly entered into, in reference to the divisional lines between them, accompanied by the erection of monuments and the occupation of the parties in conformity therewith, have been allowed to have the effect to conclude them as matter of evidence as to the extent of their respective rights. Such agreements furnish conclusive proof of the accuracy of the line thus established * * * * * * and it would not be controlled by satisfactory proof that the diverging line was not, in fact, the true original line."

In *Dudley* vs. *Elkins*, 39 N. H., 78, (1859,) the doctrine is re-affirmed to the full extent, and the distinction between

the established law of New Hampshire, viz: that such an agreement is *conclusive* upon the parties, and that of other States, as Maine and Massachusetts, where it is held to be merely "strong evidence of the accuracy of the line thus established," is pointed out by BELL, J.

Boyd vs. *Graves*, 4 Wheat., 513.

In the case at bar, if there was any evidence competent to be considered by the jury *tending* to show that the line from the *fir tree* south to Burton corner was agreed upon by the parties, the verdict must be set aside and the judgment below reversed. The record shows there was abundance of such evidence.

1. This line was run out and marked directly after the date of the grant, either in the fall of 1830 or spring of 1831, as the true line, by the grantees, (folios 87 to 89, 91, 92, 93, 157, 217, 218, 222, 223,) and "this is the best evidence of the true location of that survey."

Hall vs. *Davis*, 36 N. H., 569.

2. The State also assented and agreed to this line, by entering upon and claiming all east of it, in 1830, and by conveying to Bean *et. al.* by *express terms* to that line—certainly to a line westerly of, and nowhere touching Hart's location—Nov. 26, 1831, (folios 27, 28, 194 to 198.)

3. The disclaimer by defendant's grantors, Walker *et. al.*, from the date of their grant to 1875, of all easterly of that line, (folios 166 to 170, 174, 202 to 208, 210, 211.)

Enfield vs. *Day*, 7 N. H., 467, before cited.

4. Walker, by his surveyor, pointing out this as the true line to Norcross, who was about purchasing, (folios 210, 211.)

5. Lots run out in Elkins' grant west of this line, and courses marked and none extending east of this line, and this lotting done as late as 1867–8 (folios 85, 86, 140 to 142.

6. No evidence nor pretence that any other line was ever run and marked on this ground, or even claimed as the easterly line of Elkins' grant until about 1875, or after this controversy began.

7. Ever since the survey of this line, the State and its grantees have uniformly claimed to it—the State by entering upon and conveying in 1831, as before stated,—its grantees as shown by their deeds: (1.) Meserve to Harrington, in 1832,—folios 46, 49. (2.) Harrington to Harrington and Forbes, 1834, folios 51, 54. (3.) By legatees of Forbes to George Forbes, in 1852, folios 55, 56. See also folio 139.

8. In this claim the owners of Elkins' grant acquiesced down to the time of this controversy, more than forty years.

9. There is evidence that the State, prior to the deed of Nov., 26, 1851, to Bean, *et. al.*, was in possession up to this line on the one side, (folios, 194, 195, 196, 200,) *Graves* vs. *Company*, 44 N. H., 462, 463, and the defendants up to the same line on the other side.

In the absence of any evidence to the contrary, it will be presumed that the same possession continued—has ever since accompanied the title. *Bailey* vs. *March*, 3 N. H., 275; *Edmunds* vs. *Griffin*, 41 N. H., 532.

A state of things once shown to exist will generally, in the absence of evidence to the contrary, *be presumed* to continue; hence we say there is evidence that the parties have actually possessed the lands to this line for more than forty years. From the evidence adduced it would be competent for a jury so to find.

The authorities cited in support of this division of our brief all proceed upon the assumption that the original line is in fact fixed and certain, or capable of being made so. *A fortiori* they are applicable to the class of cases of which this is one, where the original line is doubtful and uncertain.

IV.

Upon the evidence stated in the record, a jury might well find that the grantees of Elkins' grant, when they came to survey it out, directly after obtaining it, August 31, 1830, —either the same fall or the next spring—seeing that both calls of the grant, viz: Hart's location, and a line due south to Burton corner,—could not be answered, adopted that call, *i. e.* the distance of seven miles and one hundred and seventeen rods," and the "line due south," which accorded with their understanding of the intention of the grant,—especially in view of the uncertainty of the western boundary of Hart's location,—and that this location by the grantees was assented to by the grantor, and adjoining owner, namely, the State of New Hampshire.

In other words, that the grant was practically located by the parties in accordance with the courses and distances, rejecting the monument called for as uncertain or inconsistent, or, it may be, supposing they had reached that monument. Observe that for aught that *appears in the record*, it is *possible* the "*fir*" may be found to stand upon the western boundary of Hart's location after all, that boundary to extend southerly to the point where the course changes slightly, 3° or so, *i. e.*, the point one-fourth of a mile north of Sawyer's river, 3 miles and 65 rods north of Burton corner. (Folios, 120, 121, 81, 82 and 84.)

The distinction between an agreed line, and a line settled by a "practical location," is somewhat thin and narrow. It is certain, that evidence tending to show an agreed line, under the law of New Hampshire, is also evidence of a "practical location," so termed in the books, binding upon the parties. Still there are cases in which a grantee may locate his land without the assent of his grantor, except in so far as the same may be implied from the terms of the grant.—As, for example, where the grant is upon its face void for uncertainty; as of certain number of acres out of

a larger tract. This gives the grantee a right to locate his grant where he pleases in the tract mentioned.

Haven vs. *Crain*, 1 N. H., 93;
Haywards' case, 2 Co., 36;
Moore vs. *Jackson*, 4 Wend., 59.

When a deed may enure in different ways, the grantee shall have his election, which way to take it. Thus if a reservation or exception be not described with certainty, the grantee may locate it.

Jackson vs. *Hudson*, 3 Johns, 375, 387;
Jackson vs. *Blodgett*, 16 Johns, 172, 178–9.

Although it may be, that in grants by the Crown, or State, this rule does not apply, nevertheless in such case, if the grantee does elect, and locate his land, and the Crown or State thereto assents at the time, or afterwards, undoubtedly the location becomes obligatory upon the parties. No reason is apparent why this rule should not apply where the uncertainty arises from *conflicting calls* in the deed, as well as in any other case.

If the conflict were between course and course, distance and distance, or courses and distances, neither of which, as a matter of law, prevails over the other, or between monument and monument, the rule suggested must certainly apply.

The doctrine dedueible from all the authorities is, that if a grantee locates the land conveyed to him by monuments erected and marked on the ground—although they may be entirely inconsistent with the description contained in the deed—and this location is assented to, or not objected to, for an indefinite period of years, or, as sometimes expressed, *is acquiesced in*, by the adjoining owners, such location is held to be a practical location, and binding upon all parties. Many cases go further than this—holding that if such location is assented to at the time, it is sufficient

alone to make it binding, and, upon the authorities, there is solid ground to contend that a grantee, who, by a survey and erection of monuments, has thus located his grant, is estopped to claim beyond the line thus made.

In *Lerned* vs. *Morrill*, 2 N. H., 197 (1820), it was held that "if a conveyance of land refer for its boundaries to monuments not actually existing at the time, and the parties afterwards deliberately erect the monuments, they will be bound by them in the same manner as if erected before the conveyance."

To the same effect is *Prescott* vs. *Hawkins*, 12 N. H., 27.

In *Griffin* vs. *Bixby*, 12 N. H., 454, it was held that the line actually run and marked by a committee to set off dower, must control the line stated and described in their report. Parker, C. J., (p. 456) says: "As the monuments in this case are marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return."

See also *Perry* vs. *Pratt*, 31 Conn., 434.

Miles vs. *Barrows*, 122 Mass., 579, 582, where the monuments were fences, probably erected after the delivery of the deed.

Hathaway vs. *Evans*, 108 Mass., 267.

Lovejoy vs. *Lovett*, 124 Mass., 276, where a practical construction was given to a deed, the language of which was doubtful, by the subsequent acts of the parties."

In *Hanson* v. *Russell*, 28 N. H., 111, the line between two towns had been run out originally by the proprietors of one of the towns, Albany, *altogether different from the line called for* by the charters and monuments erected thereon, and Albany had exercised jurisdiction up to that line for more than fifty years without objection; and it was held that it was a *practical location* of the line, *which must*

control the line named in the charter, although there was no evidence of acquiesence by the adjoining town, Bartlett, except that it had never, so far as appeared (there was no evidence either way upon the question), objected.

To the same effect is *Missouri* v. *Iowa*, 7 Howard, 660, where CATRON. J., says (p. 670): "Either government might bind itself to a practical line, although not a precisely true one."

See also *Kelloyg* v. *Smith*, 7 Cushing, 375, where the subject is fully considered and the authorities collected.

In *Hall* v. *Davis*, 36 N. H., 569, it was held as well settled in New Hampshire and other jurisdictions "that where land is conveyed by deed, referring to a plan or to a charter line, between which and the actual original survey as shown by fixed monuments upon the ground, there is a difference in the courses and distances or *in the location of lines and monuments*, the lines and monuments, as originally located and marked on the ground, are to govern, *however they may differ from those represented on the plan or described in the charter*." Here too there was no evidence of acquiescence.

In *Richardson* v. *Pickering*, 41 N. H., 380, the Court instructed the jury (p. 382), "that if lot 20 was originally located by boundaries marked upon the ground, or subsequently thus located and recognized as correctly located for more than twenty years by all parties interested, including the plaintiffs themselves, that location must prevail rather than the description contained in the original laying out, and the actual lines and monuments marked upon the ground must control the courses and distances named in the original laying out" (or grant,) and these instructions were held correct.

All the cases cited upon the question of an agreed line are in point, also.

"A practical location is but an actual designation by the

parties upon the ground of the monuments and bounds called for by the deed"—*Wells* v. *Company*, 47 N. H., 253—that is to say, when a monument called for by the deed is designated and marked as such by the parties, it will be taken conclusively to be *the monument referred to.*

In *Reed* vs. *Farr*, 35 N. Y., 113, one of the parties erected a fence upon what he supposed to be the true line, and the parties occupied to the fence as their boundary line for more than twenty years. This was held to be such a "practical location" of the line as to conclude the parties, although it was apparent that the fence was not on the true line.

In *Baldwin* vs. *Brown*, 16 N. Y., 359, a surveyor set a stake and stones a distance of 11 chains instead of 12, as called for by the deed to the plaintiff. The parties occupied to the line so fixed as their boundary line for more than forty years before the mistake was discovered. It was held that these facts brought "the case clearly within the settled rule in this State, which forbids the disturbance of a practical location which has been acquiesced in for a long series of years."

Generally upon this question that a monument, erected by the parties after the delivery of the deed as and for a boundary called for by it, is conclusive upon them. See—

Brown vs. *Gay*, 3 Greenl., 126.
Ripley vs. *Berry*, 5 Greenl., 24.
Esmond vs. *Tarbox*, 7 Greenl., 61.
Makepeace vs. *Bancroft*, 12 Mass, 469, (star p.)
Owen vs. *Bartholomew*, 9 Pick., 520–526, 527.

McCormick vs. *Barnum*, 10 Wend., 105. This case goes also to the point that Cummings' statement, (Record, folio 223) is competent evidence.

Kip vs. *Norton*, 12 Wend., 127.
Jackson vs. *Widger*, 7 Cow., 723.

Rockwell vs. *Adams*, 6 Wend., 467; S. C. in Error, 16 Wend., 285.
Dibble vs. *Rogers*, 13 Wend., 536.
Clark vs. *Wethey*, 19 Wend., 320.

Vide Notes to Phil. Ev. by C. & H., (3d Ed.,) vol. 4, pp. 546 *et seq.*, note 274, (to p. 324 of the text,) where a large number of cases is referred to.

Where the terms of a deed *are doubtful*, a practical location by the grantee upon either construction acquiesced in for a number of years (in this case 36 years) is binding.
Jackson vs. *Van Antwerp*, 8 Cow., 273.

So where patents described the land conveyed by reference to a map or file in the Secretary's office, and the map and the original survey did not correspond, it was held that the lines marked on the ground should prevail over the map. Says SPENCER, C. J., (p. 31,): "The real question is which shall prevail, the actual location of the lots on the ground by marking and numbering lines at the corners and by marking the lines of the lots, or the corners and distances which the map represents the lots as entitled to. The survey of the lots and the actual location of them was the joint act of all the parties interested and must control, * * * * the actual survey was the practical location." *Jackson* vs. *Freer*, 17 Johns., 29. Of this case COWEN, J., in *Rich* vs. *Rich*, 16 Wend., 677, says: "I understand the principles of this decision to be that where ground lines are established by competent authority on actual survey, and marked, they shall prevail over similar lines *marked or described on paper and filed in a public office.*"

See also *Jackson* vs. *Ogden*, 7 Johns., 238; S. C., 4 Johns. 140. In this case (which is not easy to be clearly understood) the courses, distances, and *monuments* given *in the patent* covered one tract of land, and the courses, distances, and

monuments marked upon the ground upon the actual survey of the grant covered another tract. The parties located according to the actual survey, and that was held to prevail.

See remarks of KENT, C. J., 7 Johns., 241.

Also VAN NESS, J., dissenting, *ibid.*, pp. 245, 246. SPENCER, J., (4 Johns., 143,) says: "It is, however, not to be controverted that parties whose rights to real property may be perfect, *and the boundaries of which may be susceptible of certain and precise ascertainment*, may, by their acts, conclude themselves by establishing other and different boundaries."

V.

Admitting that Elkins' grant originally, by its terms, conveyed all that defendant now claims, nevertheless, if the State afterwards entered upon a portion, to wit: the portion in dispute—took possession thereof for the purpose of recon-veying the same (whether to correct a supposed mistake or because it was supposed never to have been conveyed, is immaterial), and did so convey it to the plaintiffs' grantors; and if the defendant and his grantors acquiesced in the re-grant, and the seizin and possession under the same for twenty years—such second grant made a perfect title.

To this position, *Enfield* v. *Day*, 11 N. H., 520, is directly in point. In the case at bar we have the "ancient line," (*Ibid.*, p. 522), viz.: from the fir; no evidence that defendant or his grantors, up to 1875, ever claimed beyond or easterly of this line; abundant evidence, on the contrary, tending to show that his grantors claimed to that line only, and not beyond it, (folios 166 to 176, 202, 213, 217, 223,) the surveyor being Walker's agent; Norcross about to purchase, etc., etc.

As to re-entry by State, re-survey, etc., (Vide remarks of court, 11 N. H., 529; folios 194, etc.,) all Rogers' testi-

mony, in connection with Willey's deed to Bean *et al.*, and Bean *et al.* to Harrington. (Folios 25 to 30, 46 to 49.)

Willey had authority to execute the deed necessarily by force of the act of the Legislature. (Folio 25.)

The form of the grant is not material, that is to say, whether it be direct by act of the Legislature or through an agent duly authorized.

This position seems not only important but decisive in our favor, if *Enfield* vs. *Day*, before cited, is authority. That case goes on all fours with the present one, and, so far as we can discover, there is no distinction between them.

Though Willey's deed does not refer to the "fir" as the northeast corner, or to any marked trees in the line, yet it places the line clearly and distinctly some distance west of Hart's location and nowhere touching it. The subsequent deeds are more explicit.

OSSIAN RAY,
of Counsel for Plaintiff in Error.

The [redacted] plan is a reduced copy (such as material to the questions herein) of the plan used upon the trial.

A, B, C, D encloses all by lines to the tract in dispute.

E, is the northeast corner of the town of Elkins—the place of beginning called for in the description of Elkins' grant (vol. 12, 81).

B, C, is the Westerly boundary of Burt's location, as the defendant claims it to be located.

B, C, D is the easterly line of Elkins' grant as claimed by the defendant.

A, D, is the easterly line of that grant as the plaintiff claims the same was originally located and agreed to by the parties.

B, D, is the easterly line thereof as claimed by the plaintiff, in the case they fail to maintain the line A, D, by a practical location to agreement.

D is the north west corner of Burton, now Wirt.

Supreme Court of the United States.

No. 251.

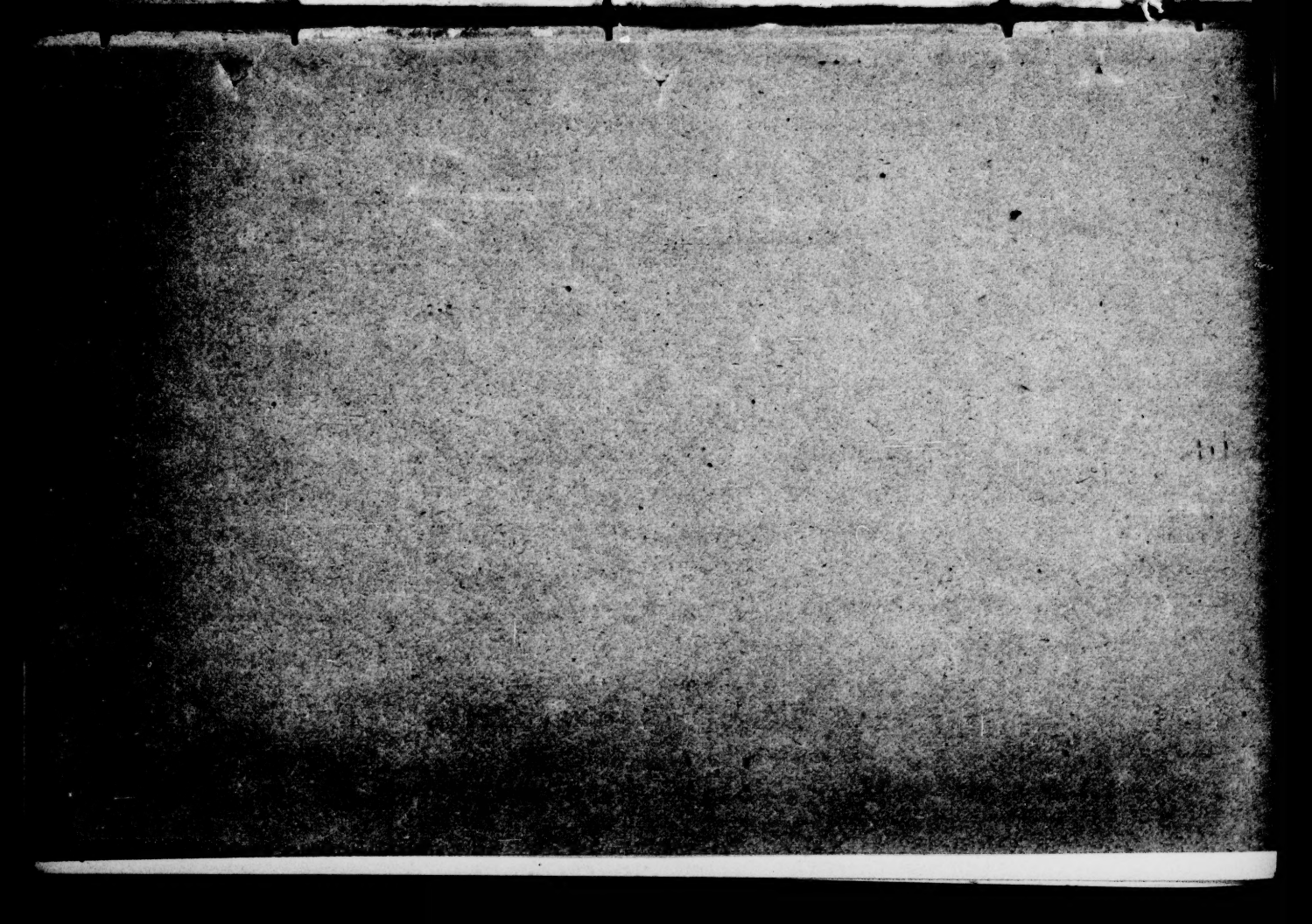
THE BARTLETT LAND AND LUMBER COMPANY,

PLAINTIFF IN ERROR,

vs.

DANIEL SAUNDERS.

DEFENDANT'S BRIEF.



Supreme Court of the United States.

No. 251.

THE BARTLETT LAND AND LUMBER COMPANY,

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DEFENDANT'S BRIEF.

STATEMENT OF CASE.

This is a writ of error to the Circuit Court of the United States for the District of New Hampshire.

The original suit was a writ of entry in which the demandant, the plaintiff in error, claimed certain land situated in Grafton County, in the State of New Hampshire.

The writ was dated the 23d day of November, A. D., 1875, and was made returnable before the Circuit Court of the State of New Hampshire, holden at Plymouth, in and for the eastern Judicial District of the County of Grafton, in said State of New Hampshire, on the first day of May, 1876.

Record, pp. 1, 2.

The cause was removed from said Circuit Court to the Circuit Court of the United States for the District of New Hampshire, upon the petition of the demandant, and duly entered in said court at the May term thereof for the year 1876, according to the provisions of the Act of Congress, approved March 3d, 1875.

Record. pp. 1–5.

Upon the entry of the action in said Circuit Court of the United States, the parties appeared by their respective attorneys, and, on the 24th day of July, 1876, the tenant, the defendant in error, filed his plea, by which he disclaimed title to a part of the premises described in the demandant's writ, and pleaded ***nul disseizin*** to that portion which lies west of the western boundary of Hart's location, and a line drawn from the north-west corner of Albany, to the nearest point on Hart's location, which portion is described by metes and bounds in his said plea.

Record, pp. 1, 6.

The demandant on the 27th day of September, 1876, filed a replication, accepting the defendant's disclaimer, and joining issue on the plea of ***nul disseizin.***

Record, pp. 1, 7.

The cause came on for trial at the May term of the said Circuit Court of the United States for the year

1878, before the honorable Daniel Clark, judge, and a jury.

The plaintiff claimed title through *mesne* conveyances under a deed of release and quit claim from James Willey, land commissioner of the State of New Hampshire, to Bean, Meserve, and Gilman, dated November 26th, 1831, of all the right, title and claim, except the right of jurisdiction which the State then had to the land described in the deed.

Record, pp. 7, 8.

They also put in evidence a deed from A. B. Kelley, treasurer of the State of New Hampshire, to Jasper Elkins and others, dated August 31st, 1830, conveying to them, their heirs and assigns, all the right and title which the State of New Hampshire had unto a tract of land, situated in the County of Grafton, and described as follows, to wit:

Beginning at the north-east corner of the town of Lincoln and running east seven miles and one hundred and seventeen rods, to Hart's location; thence southerly by the westerly boundary of said location to a point so far south, that a line drawn thence due south shall strike the north-west corner of Burton (now Albany); thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern

boundary of Hatch and Cleaves' grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln, and along this line to the point first mentioned.

Under this deed, as appears by the record, the defendant claims title.

Record, pp. 7, 9.

This deed was authorized by a resolve of the Legislature of New Hampshire, a copy of which was offered in evidence, and no question is raised as to its validity.

Record, p. 12.

The land conveyed by it is known as the Elkins grant, and what is now known as Hart's location is the royal grant to Thomas Chadbourne, granted April 27th, 1772.

Record, p. 7.

A copy of this latter grant was offered in evidence, together with a copy of the plan referred to therein; also a copy of the Nathaniel Merrill plan, so called, of said Hart's location, attested by B. F. Prescott, secretary of state of New Hampshire, December 16th, 1875.

Record, pp. 7, 10, 11.

The year following the grant to Elkins and others, the Legislature created the office of land commissioner, and gave the commissioner power to give deeds of State lands. James Willey was subsequently duly appointed and qualified to the office, and in that capacity gave the deed under which the plaintiff claims.

Record, p. 7.

As the deed of the Elkins grant, so called, was the prior one, the later deed will convey nothing previously granted by the former to Elkins and others, and the first question that arose in this case was, what land was so conveyed.

The plaintiff also introduced the following witnesses, viz: George W. M. Pitman, Joseph Pitman, Philip C. Wilkins, James Rogers, Mark W. Pierce and Daniel Elkins, to prove that the defendant was barred from claiming any of the land described in the plaintiff's writ.

Record, pp. 8, 17–60.

During the examination of the witness Philip C. Wilkins, counsel for the defendant asked him, upon cross examination, the following question: "From what point in the west line of Hart's location did you propose to start to strike the north-west corner of Albany?" To this the witness answered, "In answer to that question, I will say, by the information I then had, if I had gone

right on at that time, I would have gone to the nearest point from Hart's location to the north-west corner of Albany." This question was admitted by the judge under the objection of the counsel for the plaintiff, and the plaintiff excepted to its admission.

Record, p. 48.

At the close of the plaintiff's evidence, the defendant without introducing any evidence, moved the Court to instruct the jury to return a verdict for the defendant. Whereupon the Court made the following rulings to the jury and directed them to return a verdict for the defendant.

1. That in the construction of deeds, monuments fixed and certain, or which can be made fixed and certain, will govern the course and distance.

2. That Hart's location, having been originally granted by a deed or grant made upon an actual survey by metes and bounds, which bounds can be recognized and located, and having long been occupied by settlers, and surveyed and recognized by the government of New Hampshire, is such a monument, and will control the distance given in the line running east on the north side of the Elkins grant, notwithstanding the exterior line of Hart's location is not shown upon the ground at the point where the north line of Elkins' grant running east would strike it.

3. That by the true construction of the Elkins grant, the line runs on the northerly side east to to the westerly side of Hart's location; thence southerly by Hart's location to the nearest point to the north-west corner of Burton (now Albany).

4. That there is no evidence before the jury to estop or bar those claiming under the Elkins grant from maintaining that line, and that upon the case, as it now stands, the demandant is not entitled to recover.

Record, p. 61.

The verdict will be found in Record, p. 62.

The plaintiff excepted to each of said rulings and instructions, and a bill of exceptions was signed and sealed by the presiding judge and ordered by him to be recorded in the case, on the 14th day of May, 1878, the day on which the verdict was rendered.

Record, pp. 61, 62.

This writ of error was, on the 21st day of the said May, signed and allowed.

Record, pp. 63, 64.

BRIEF.

The first question raised by this record is, what is the true construction of the deed from the State of New Hampshire to Elkins and others, under which the defendant claims title, this deed being prior to the one under which the plaintiff claims. This is a question of law to be decided by the Court.

Brown v. Huger, 21 How., 305. 318.
Abbott v. Abbott, 51 Maine, 575, 581.
Grand Trunk R. R., v. Dyer, 49 Vermont, 74, 83.
Bolton v. Lane, 16 Texas, 96, 112.

This brings us to a consideration of the first three rulings of the judge presiding in the Court below, the first two of which are preliminary to the main question. The principles of law therein laid down can not, we respectfully claim, be controverted, and they are applicable to the facts in evidence in the case at bar.

I.

The first ruling is as follows: "That in the construction of deeds, monuments fixed and certain, or which can be made fixed and certain, will govern the course and distance."

Record, p. 61.

1

This rule is elementary; it is laid down in all the text books on the subject, and has the sanction of courts of last resort throughout the country.

Brown v. Huger, 21 How., 305.
McIver v. Walker, 9 Cranch, 173.
Newsom v. Pryor, 7 Wheat., 7.
Smith v. Dodge, 2 N. H., 303.
Enfield v. Day, 11 N. H., 520.
Sanborn v. Clough, 40 N. H., 316.
Chadbourne v. Mason, 48 Maine, 389.
Colton v. Seavey, 22 Cal., 496.
Haughton v. Roscoe, 3 Hawks, 22.
Mayhew v. Norton, 17 Pick., 357.

In the case of Newsom v. Pryor, *sup.* one of the calls, in the description of land conveyed by deed, was 894 poles to a stake, crossing the river. The Court held that this boundary must be run 1222 poles, in order that it might cross the river, and they say that material and most certain calls shall control those which are less

material and less certain, although the general effect of this principle is, undoubtedly, that the purchaser acquires more land than is expressed in his grant, and more than he has paid for.

In the case of Chadbourne v. Mason, *sup.* one of the calls was south 17 degrees west, 35 rods to a stake and stones, and the Court read east for west holding that the monument would govern the course.

In the case of Colton v. Seavey, *sup.* one of the courses called for in the deed was westerly, but the Court followed a north east course instead, in order to comply with the monuments called for in the description.

In the case of Mayhew v. Norton, *sup.* land was conveyed bounded by the harbor of Edgartown, and the Court held that the flats in front of the lots passed, although the description, both as regarded the quantity of land conveyed and the length of the lines, would have been satisfied by applying it to the upland alone.

2

The object to be attained in the construction of a deed is to discover the intention of the parties as expressed in the instrument itself.

The reason upon which the above rule is founded is, that monuments are more certain than course and distance, and that there is much greater liability of error in regard to the latter than to the former.

There are, however, cases in which courts, in construing deeds, have given the preference to course and distance over monuments, but only when it was evident from the whole deed, that by so doing the intention of the parties would be carried out.

Davis v. Rainsford, 17 Mass., 207.

But these cases are only exceptions to the general rule which tend strongly to confirm it; and, in almost all instances of this kind, courts, while carefully pointing out the peculiar facts which make the cases under consideration exceptions to the general doctrine, affirm the rule previously given.

Thus, in one case the court say that, if anything in the description shows that course and distance are correct, rather than the monuments, they will control. For instance, if the deed shows that the intention was to convey a specific portion of land, and the courses and distances embrace the precise quantity, but more or less would be given by following the monuments, the former will govern.

Baldwin v. Brown, 16 N. Y., 359.

But see, Mayhew v. Norton, 17 Pick., 357, *ubi supra*.

If some of the monuments called for are repugnant to the calls for others of like character, the preference may be given to course and distance.

White v. Gay, 9 N. H., 126.
Park v. Loomis, 6 Gray, 467, 472.
Townsend v. Hayt, 51 N. Y., 656.

The case of Hamilton v. Foster, 45 Maine, 32, is of like character. In this instance, to have reached and followed a call for a line along another's lot, would have made it necessary to neglect altogether another monument called for, or else to introduce into the description a new boundary. In either case the distance would have been greatly exceeded, the shape of the lot would have been changed and the area would have been much larger than that called for in the deed.

See also B., N. Y. and E. R. R. Co., v. Stiegler, 61 N. Y., 348.

The rule for the construction of deeds has recently been considered by this court in the case of White v. Luning, 93 U. S., 514.

The lot described in the deed there under consideration had been carefully surveyed, and the description was made from the survey. The last call was for a line running a certain distance, south 41 degrees and 37

minutes east, from a known point to the point of beginning. The court read west for east, following the rule that monuments should govern courses. But, in another part of the same description, the line followed a fence for six different courses, and the seventh call was, by a certain angle a certain distance, along the fence to the north boundary of the rancho Sal Si Puedes, on the mountains. The direction of this line, as given by the deed, was almost at right angles to the fence, and if the fence were to be followed, the mountain would not be reached at all, the other calls could not be complied with, and the instrument would be unintelligible. The court held that the given course should be followed the required distance, which would carry the line to the summit of a chain of mountains upon which run the county boundary, but not that of the rancho, this latter being upon another chain of mountains at some distance beyond. By following the calls along this first chain, the description would otherwise be accurate; but, if the line were prolonged to the second chain, none of the remaining calls could be complied with, and the deed would be void for uncertainty.

The court therefore held, that the call for the north boundary of the rancho should be rejected, and the line run the given course and distance to the nearer mountains. In this way, all the other boundaries agreed with the description and the land embraced by them contained the exact amount for which the deed called. The

question under consideration was, whether this construction should be adopted and the deed made operative, or whether the deed should be declared void as utterly unintelligible.

This was a case in which it was plain that an error had been made in the deed, first, in running too far along the fence, and secondly, in confounding the county line along one range of mountains with the rancho boundary along another.

In Coburn v. Coxeter, 51 N. H., 158, 164, the court say that there is no case in that State in which the description of distance has been allowed to control that of monuments.

3

The cases above cited, we submit, confirm the doctrine for which we contend; that the intention of the parties to a deed must govern; that that intention must be gathered from the deed; that, in seeking for the intention, monuments will always prevail over courses and distances unless it is evident, from the whole description, that certain monuments are inconsistent with others of like character, while course and distance are not, or, unless it is plain from the whole deed that course and distance are more likely to be correct; that the presumption is always in favor of the accuaracy of monuments other things being equal.

Seidensparger v. Spear, 17 Maine, 123.

II.

The second ruling is as follows: "That Hart's location having been originally granted by a deed or grant made upon an actual survey by metes and bounds, which bounds can be recognized and located, and having long been occupied by settlers, and surveyed and recognized by the government of New Hampshire, is such a monument, and will control the distance given in the line running east on the north side of the Elkins grant, notwithstanding the exterior line of Hart's location is not shown upon the ground at the point where the north line of Elkins' grant, running east, would strike it.

Record, p. 61.

The statement of facts made by the judge in this ruling must be regarded as conclusive, and no exception was taken to the accuracy of such statement, but the evidence very amply sustains the conclusions of the judge.

I

The plaintiff produced a copy of the original grant of Hart's location, with a copy of the plan annexed and referred to therein, the grant itself setting forth that it had been measured and that a survey had been made.

Record, p. 7.

Also the act of the Legislature of New Hampshire of December 30th, 1803, and the amendment thereof of June 18th, 1805, by the terms of which, all towns in the State were directed to cause accurate surveys to be made, and to transmit maps of the towns to the office of the Secretary of State, on or before the first Wednesday of November, 1805.

Record, p. 7.
Laws of N. H., 1805, pp. 207, 379.

Also a copy of the Nathaniel Merrill plan, so called, which was the plan made and filed in accordance with the above recited statute, as appears by the following testimony of G. W. M. Pitman:

Q. 216. Did you ever see in the office of the Secretary of State a plan returned about the year 1806 of Hart's location?

A. I suppose I saw the original recently, of which that is a copy.

Q. 217. Are you familiar with the fact that the State of New Hampshire, in 1803, required plans to be made of the towns and places in the State?

A. I am.

Q. 219. Have you seen any such plan (of Hart's location)?

A. I have seen the original, of which I suppose that is a copy.

Q. 221. With reference to the plan made in 1803, have you seen such a plan as that, made by the political authorities of the location, the selectmen, or whoever were acting as such, and returned to the office of Secretary of State, between 1803–1807?

A. I think I saw a plan in the Secretary of State's office purporting to be made by Merrill.

Record, pp. 7, 29.

The bounds of Hart's location can be recognized and located.

G. W. M. Pitman surveyed and located them in 1859.

Q. 35. State whether or not that location, (Hart's) within your knowledge, has ever been marked upon the ground on the face of the earth; and, if yes, when?

A. I made a survey of that tract in 1859, I think.

Record, p. 18.

Q. 212. State whether you can lay down Hart's location, according to this plan, annexed to the grant?

A. You can lay it down in a way any good surveyor can.

Q. 213. I ask whether, take this plan, you can lay it down on the earth;

A. Yes; you can lay it down on the earth. Yes; take the plan, you can do it.

Record, p. 29.

The first boundary is fixed and ascertained beyond question; it commences on the ancient Vere Royce grant, at a known point; thence runs north on a well defined line 470 rods; thence extends westerly the same breadth of 470 rods for the distance of 285 rods; thence north-westerly 600 rods; thence nearly a north course 1300 rods, as laid down upon a plan accompanying and made by the terms of the grant a part of the description thereof. These bounds can be made certain and located by an accurate survey.

See description in grant, Record, p. 11.
Testimony of Pitman, ques. 23–28, Record, p. 18.

By the Merrill plan, Hart's location had well defined limits and became one of the well known geographical sub-divisions of the State. By this plan, not only do the exterior lines appear to have been run, but also the whole location is shown to have been divided into lots by actual survey, as each lot is marked by course and bound, and the area of each given, no two of which correspond in size.

Both of these plans were recorded in the archives of the State.

It is true that Pitman tried to give the impression that this grant could not be located, notwithstanding the fact that he practically refuted any such theory, by showing that he had himself located it; but, it appears that his sole difficulty was with the upper bound, which he claims to be some miles further north than the grant and the plan give.

Ques. 51, 52, 55. Record, pp. 19, 20.
Ques. 396, 397 Record, p. 39.

Now with the location of this northern boundary we have nothing to do in this case; with the southern boundary fixed, the width known, the courses, distances and plan given, it is self evident that there can be no difficulty in locating the western boundary, which is the only one which concerns this case.

Pitman testified that Hart's location has been occupied by settlers since his remembrance, that he had examined

"*Resolved, etc.*, ... Hart's location in the county of Coos be annexed and classed with the towns of Bartlett and Adams, in said county, for the purpose of electing a representative to the General Court, until the Legislature shall otherwise order."

Approved December 24th, 1828.

New Hampshire Laws 1824–1829, page 459.

In an act for making and establishing a new proportion for the assessment of public taxes in 1816, Hart's location was assessed 8 cents on a thousand dollars.

Acts of 1816, c. XCV. Laws of 1811–1821, p. 86.

In 1820, it was assessed 12 cents on one thousand dollars.

Acts of 1820, c. LXXXI. Laws of 1811–1821, p. 369.

In 1824, 10 cents on one thousand dollars.

Acts of 1824, c. CLXI. Laws of 1824–1829, p. 32.

In 1829, 8 cents on one thousand dollars.

Acts of 1829, c. CXVIII. Laws of 1824–1829, p. 447.

According to the schedule of whole number of persons in the State of New Hampshire, there were 35 inhabitants of Hart's location in 1810 and 65 in 1820.

See Laws of New Hampshire 1811–1821, Appendix, p. 29.

the lots of some of the settlers, some of which had been occupied 50, 60 or perhaps 100 years, and that these settlements extend almost the whole length of the location.

Ques. 185–198. Record, pp. 27, 28.

It was recognized by the State as a political organization, sending representatives to the General Court.

Ques. 206, 207. Record, p. 28.
See also, Rev. Stat. of N. H., c. 29, § 15, p. 91.

Its boundaries are important jurisdictional lines dividing counties.

Gen. Laws of N. H., c. 20, §§ 5, 10, pp. 81, 82.
Acts of N. H., 1875, c. 31.

2

It has been repeatedly decided that the line of another tract of land is a monument, which will control both course and distance mentioned in a deed.

Peaslee v. Gee, 19 N. H., 273.
Cunningham v. Curtis, 57 N. H., 157.
Breck v. Young, 11 N. H., 485.
Howe v. Bass, 2 Mass., 380.
Flagg v. Thurston, 13 Pick., 145
Henshaw v. Mullens, 121 Mass., 143.
Bond v. Fay, 8 Allen, 212.
Chadbourne v. Mason, 48 Maine, 389.
Abbott v. Abbott, 51 Maine, 575.
Haynes v. Young, 36 Maine, 557.
Park v. Pratt, 38 Vermont, 545, 551.
Bolton v. Lane, 16 Texas, 96.
James v. Breck, 6 Heisk, 151, 157, 158.
Corn v. McCrary, 3 Jones, 496.

In the case of Breck v. Young, *sup.* the course was varied from south 61 degrees east, to south 66 degrees east in order to follow the line of another's land.

In the case of Howe v. Bass, *sup.* land was described as bounded forty-five feet on a street between the lines of adjoining owners. Held, that this line must be extended to sixty-five feet, in order to reach from the line of one tract to that of the other.

In the case of Flagg v. Thurston, *sup.* the length of one line was cut down from 14 rods 5 links to 8 rods and 5 links, because it was held that the line of another tract was a monument which controlled distance.

In the case of James v. Breck, *sup.* one call was for a marked tree, and thence with the line of another tract. The marked tree was 40 rods short of the line of the tract, and it was held, that the boundary must be run beyond the tree, to the line of the tract called for.

In the case of Corn v. McCrary, *sup.* it was held that the line of another tract, called for in the description of land in a deed, was a monument which controlled both course and distance, and that it made no difference whether that line was marked or unmarked.

3

Hart's location is such a monument, fixed and certain, that, in the construction of a deed in which it is mentioned as a boundary, it will control both course and distance.

The fact that its westerly line had never been actually located on the ground at the point where the north line of Elkins' grant strikes it, will in no way vary the rule. *Id certum est quod certum reddi potest.*

Corn v. McCrary, 3 Jones, 496.
Dula v. M'Ghee, 12 Ire., 332.
Brown v. Hobson, 3 A. K. Marshall, 380.
Kronenberger v. Hoffner, 44 Mo., 185, 192.

4

The reason upon which this rule is founded is peculiarly applicable to the facts of this case.

The Legislature knew that Hart's location lay to the east of the tract in question, and, unless they had intended to convey all the land between the towns on the western side and the location, they would not have made its western boundary the eastern boundary of Elkins' Grant. If the distance from the Lincoln corner to the location was greater than they supposed, that would not affect a deed conveying all the land lying between the two bounds.

Newsom v. Pryor, 7 Wheat., 7.
Mayhew v. Norton, 17 Pick., 357.

They evidently considered the position of the point on Hart's location, from which the line was to be drawn

due south to the Albany corner, as uncertain, for they made no attempt to estimate the length of the second bound.

The whole country in which Elkins' grant lies, is, to this day, a wilderness, lying between the sparsely settled Hart's location in the valley of the Saco on the east, and the towns of Thornton, Lincoln and Franconia on the west.

Pitman testifies that the north line ran over a pretty rough country to travel over; a pretty rough country to survey; that the country was wooded, rough, with rocks, ledges and swamps.

Ques. 301–304, 308–315. Record, p. 34.

The computation of course and distance must have been, at the date of the deed, wholly a matter of conjecture, while the boundaries of the towns on each side were easily capable of determination, and thus gave fixed data by which the west, north and east line of the tract could be ascertained without difficulty.

It is much more likely that it was the intention of the grantors, (the thing to be sought in the interpretation of the deed) to convey the whole tract between the boundaries of the above named towns, than to be precise about course and distance in a trackless wilderness. It seems hardly credible, that they could have intended, while

setting forth in the grant that the tract should extend to Hart's location, to reserve a long and narrow strip between the two.

Newsom v. Pryor, *ubi supra.*

5

The fact that the deed to Bean, Meserve and Gilman was merely a release of the right which the State then had in the land described, seems to indicate that the grantors had doubts as to their title.

There was no attempt made in the Elkins grant to estimate the amount of land conveyed, so that we can not be guided in any way by area, nor is there anything, we respectfully submit, to take this case out of the general rule, that, in the construction of deeds, monuments are to prevail over course and distance.

III.

The third ruling is as follows: "That, by the true construction of the Elkins grant, the line runs on the northerly side, east to the westerly side of Hart's location; thence southerly by Hart's location to the nearest point to the northwest corner of Burton (now Albany)."

1

In accordance with the principle above set forth, the northerly line of Elkins' grant, beginning at the northeast corner of Lincoln, a fixed point about which there is no dispute, must run easterly until it reaches the westerly side of Hart's location, and for the same reasons, the line must run thence southerly by the westerly boundary of the location.

It has been decided that the words "by land of adjoining owner" mean along the line of such land.

Peaslee v. Gee, 19 N. H., 273.
Breck v. Young, 11 N. H., 485.
Enfield v. Day, 11 N. H., 520.
Brown v. Hobson, 3 A. K. Marshall, 380.

2

The line from Hart's location to the Albany corner must be a straight one.

Allen v. Kingsbury, 16 Pick., 235.

In this case the Court say, "When a line is given in any deed or other instrument of conveyance, to be run from one landmark to another, it is a necessary inference that a straight line is to be run from one of the

termini to the other, and without regard to the correspondence of either course or distance, unless a different line is described in the deed or instrument of conveyance."

Ib. 238–239.

To the same effect are the following cases:

Henniker v. Hopkinton, 18 N. H., 98.
Jenks v. Morgan, 6 Gray, 448.
Henshaw v. Mullens, 121 Mass., 143.
Call v. Barker, 12 Maine, 320.

3

At what point, then, shall we leave the boundary of Hart's location?

There is no such point as that mentioned in the grant, from which a line drawn due south shall strike the northwest corner of Albany, the whole western boundary of the location being east of such a line.

Ques. 90–97. Record, p. 22.
Record, pp. 47, 48, 50.

This boundary must then be a line drawn from Albany to the nearest point on the westerly line of the location.

Branch v. Campbell, 4 Jones, 313.

In this case one of the calls of the deed was for a line, running a given course and distance to McLeod's land, but the distance given was not sufficient to reach it, neither would the line extended in the given course touch McLeod's land at all. The lower court ruled that the given course must be followed the specified distance, and then the line run the shortest distance to McLeod's land. This ruling was held to be erroneous.

The appellate court say, "It is well settled that the call for the line of another tract of land which is proved is more certain than, and shall be followed in preference to one for mere course and distance." "This rule, (that of the court below,) is liable to the objection of introducing into the call two lines when one is given. The two lines may have the effect of including much more, or much less land than the quantity granted. The grantor supposed that one straight line would run a certain course and distance to the land mentioned. In this he is found to have been mistaken, and we have already seen that effect must be given to his grant by following the more certain description. This must be done by running a straight line to the land, or other object called for, disregarding altogether the erroneous description of the course and distance. When the object designated has a considerable extension—as in the case of a river, swamp, or the line of another tract of land,—then the disputed line must be run to the nearest point on said river, swamp, or line of another tract."

In the case of Coburn v. Coxeter, 51 N. H., 158, the above case of Campbell v. Branch is cited in the opinion, and the principle there laid down approved by the New Hampshire court.

In this case there was a call for a line running north 8 3-4 degrees east, about 20 rods to a road. A line run in that direction would not reach the road at all. The court held that the line must be run to the road, neglecting course and distance, and say that, when a boundary of an extensive character, such as a river or swamp is called for, the line must be run to the nearest point in such object.

Where any principle of law, establishing a rule of real property, has been established in the State Courts, the same rule will be applied by the United States Courts that would be applied by the State tribunals.

Suydam v. Williamson, 24 How, 427.
Jackson v. Chew, 12 Wheat., 153.
Walker v. State Harbor Com., 17 Wall., 648.

4

We shall arrive at the same conclusion, if we consider the north and south line called for in the case at bar an impossible one, and therefore one to be disregarded in construing the grant. We shall then have a

gap in the description of this tract, a boundary to be supplied, extending from the north-west corner of Albany, a fixed point, to some point on the westerly boundary of Hart's location. This boundary should be the shortest line between the two monuments.

Clough v. Sanborn, 40 N. H., 316, 329.

5

If, instead of following these principles, we construe the grant as requiring a line to be run north from Albany until it strikes the northern boundary, we reject the call that the north line shall extend to Hart's location, and a whole boundary along its western side; we reduce the number of the lines called for, by one, and even in that case, the northern line will be longer than the deed calls for.

G. W. M. Pitman testifies that he followed this line, west towards Lincoln from what he claimed to be the corner, for a distance of eight miles and one hundred and thirty-two rods, and then stopped at the Franconia branch of the Pemigewasset without reaching the Lincoln corner.

Ques. 150–157. Record, pp. 25, 26

6

If we draw a line from the Albany corner to the point where the north line of the grant strikes Hart's

location, we omit altogether the call for the line running southerly by the westerly boundary of the location, the north line will be as far out of the way as in the construction for which we contend, and we replace two lines by one.

7

Another construction would be, to run a line along Hart's location southerly to such a point, that the course of a line, drawn thence to Albany, would conform most nearly to that of a due north and south line. To entitle the plaintiffs to such a ruling, the burden was upon them to show that there was such a point south of the intersection of Hart's location and the northern boundary.

Not only is there no evidence of the existence of such a point, but, on the contrary, the testimony of Wilkins tends to show, (what is in truth the fact, as will be seen by reference to the plans,) that the line conforming most nearly to such a course, will be that drawn from the termination of the north line to Albany corner.

Wilkins testified that from the pine tree on the northern line, which he marked as a corner between the location and Elkins' grant, the Saco river, in the valley of which Hart's location is situated, runs southerly and then easterly, and that the further you go down the river the further you are from a north and south line.

Record, pp. 49, 50.

Such a construction, therefore, amounts to the same thing as the one just alluded to, and is open to the same objection of omitting altogether the call for the line on the westerly boundary of the location.

Schultz v. Young, 3 Iredell, 385.

In this case, there was a call for the north-west corner of Richard Goode's tract, thence south with Richard Goode's line 310 poles to Thomas Goode's old corner. This corner was not on the Richard Goode line, and if that line were to be followed the required distance, itwould be necessary to run a line almost at right angles with it to reach the Thomas Goode corner.

The defendant claimed that the line should be run directly from the north-west corner of Richard Goode's land to the Thomas Goode corner; but the court held, that Richard Goode's line must be followed the required distance, and that the line should run thence to the corner required.

8

There is another possible construction, for which, it seems to us, the plaintiff can not seriously contend, and that is this: To run a certain distance on the location in order to comply with the call for such a boundary, and then to run due west until a point is reached from

whence a line can be drawn due south to Albany corner, which latter line is then to be followed. Such a rule would not only be open to the objection of introducing a line not mentioned in the deed, and so making the tract, of a shape evidently not intended, but it is also open to the very serious objection, that there is no rule to direct us how far we shall follow the line of the location, a rod, a hundred rods, one, two or five miles, or any other distance.

Any such point of departure must be one arbitrarily assumed by the court, and, if the court should undertake to fix such a point, they would not be construing the old deed but making a new one, by which, perhaps more land, perhaps less, would be granted than was intended by the parties.

9

The rule for which we contend is simple, definite and easy of application, and is founded in reason as well as established by precedent.

By following it, the grant will be bounded by all the monuments called for, have the same number of sides, and be of substantially the same shape as described in the deed; the only discrepancy will be in the length of the northern boundary and in the course of the line connecting Hart's location with Albany.

10

There is another rule of construction in the interpretation of deeds, favorable to the defendant's claim, which is that, when other means of discovering the intention of the parties fail, that construction shall prevail which is most favorable to the grantee.

Cocheco Manf. Co., v. Whittier, 10 N. H., 309, 311.
Clough v. Bowman, 15 N. H., 504.
Sanborn v. Clough, 40 N. H., 316, 330.
Eliot v. Thatcher, 2 Met., 44, 45.

IV.

The fourth ruling was as follows: "That there is no evidence before the jury to estop or bar those claiming under the Elkins grant from maintaining that line; and that upon the case, as it now stands, the demandant is not entitled to recover."

The question then arises, what acts or circumstances are sufficient to prevent a party claiming under a deed from holding to the full extent of his paper title.

a.

An early case in New Hampshire, that of Lerned v. Morrill, 2 N. H., 197, holds that where land has been conveyed by deed, and the description of the land in

the deed has reference to monuments not actually in existence, but to be erected by the parties at a subsequent period; when the parties have been on the land, and fairly and deliberately have erected the monuments, they will be bound by them.

b.

There is another class of cases in which it has been held, that, if an original survey is made at the time of making a deed, for the purpose of fixing the monuments by which the land is described in the conveyance, such monuments, so fixed by the survey, will control the lines described in the deed.

Hall v. Davis, 36 N. H , 569.

c.

There are also cases in New Hampshire and in some other States which hold that owners of adjoining lands may settle and establish a division line between them by express agreement, and when that agreement is executed, monuments erected, and occupation and possession shaped in accordance with the division line, the parties will be bound by it, although it afterwards turns out not to be the true line. Where no express agreement is shown, long acquiescence by one party in a line

established by the other is evidence from which such agreement may be inferred.

Clough v. Bowman, 15 N. H., 504.
Dudley v. Elkins, 39 N. H., 78.
Richardson v. Pickering, 41 N. H., 380.
Baldwin v. Brown, 16 N. Y., 359.
Rockwell v. Adams, 7 Cowen, 761.
Adams v. Rockwell, 16 Wend., 285, 302.
Avery v. Baum, Wright, 576.

It has also been held in New Hampshire, that an agreement by adjoining proprietors that a surveyor shall run a line between their lands is binding.

Dudley v. Elkins, *ubi supra.*

These are all cases of what is called practical location, which is but an actual designation by the parties upon the ground of the monuments and bounds called for by the deed.

Wells v. Jackson Iron Co., 47 N. H., 235, 253.

In all these cases the element of agreement between the parties in reference to the location is an essential feature. No act of one party alone will bind the other.

This doctrine of practical location has been carried so far in some States, and especially in New Hampshire,

that owners of adjoining lands are actually permitted to convey, by parol agreement, portions of such premises from one to the other, for such is the practical result of the case of

Gray v. Berry, 9 N. H., 473.

Such a doctrine, we submit, should be carried no further than adjudged cases have gone, and in no case should land be held to be conveyed without evidence of the concurring act or agreement of both parties.

Wells v. Jackson Iron Co., 47 N. H., 235, 253, 262.

d.

A party may by his declaration or acts in relation to his boundary estop himself from denying that it is located in a certain place, and so, by the doctrine of estoppel, preclude himself from claiming up to the full extent of his paper title.

Richardson v. Pickering, 41 N. H., 380.
Adams v. Rockwell, 16 Wend, 285, 302.
Welder v. Hunt, 34 Texas, 44.

Does the testimony in this case bring it within any of these classes?

G. W. M. Pitman testified that he has had more or less experience as a surveyor for the last thirty years.

Ques. 5. Record, p. 17.

On behalf of the plaintiff he attempted to run the east and north lines of Elkins' grant, that he went first upon the line in the latter part of June, 1875, again in August, and next in October of the same year, and again in the fall of 1876.

Ques. 252. Record, p. 31.
Ques. 56–64. Record, p. 20.

He commenced at the north-west corner of Albany and run some three miles till he passed over Sawyer's river, and retraced the line that distance; later in 1875 he run the whole length of the line and run the north line.

In 1876 he retraced the east line and examined it carefully; he found a line running north 2 1-2 degrees east from Albany corner about three and a quarter miles, across Sawyer's river.

In August he commenced at the three mile tree and found that the line run, from that point, on a course some three or four degrees out of the one he had been running. He run this line to the north line of the grant where he found a fir tree spotted as a corner.

Ques. 70, 86-94. Record, pp. 21, 22.

He also testified that he found the age of the first part of the line to be 46 grains, and that he found the line somewhat older from Albany to Nancy's brook than from that point to the fir tree; that Nancy's brook was about a mile and a half from the north line.

That this line had been spotted from end to end according to his judgment in the year 1850.

Ques. 116–118. Record, p. 23.
Ques. 134–136. Record, pp. 24, 25.
Ques. 278–285. Record, p. 33.

In counting the grains of the marks on the trees, he found 45 grains in 1875 and 46 grains in 1876; his remark therefore in answer 90, page 22, that he counted 46 grains in 1875, is inconsistent with his other testimony on this subject and is evidently a mistake.

Ques. 127. Record, p. 24.
Ques. 255. Record, p. 31.

He produced four chips cut in 1876, three of which were marked, and of these three, the one cut farthest from Albany was cut near Sawyer's river; it did not appear from what part of the line the fourth was cut. He testified that the one cut near Sawyer's river had 46 grains.

Ques. 137–140. Record, p. 25.

That upon a chip cut near Nancy pond brook within a mile and a half of the north line, he *called* the number of grains 46; and that there is sometimes difficulty in counting the grains within a year or two.

Ques. 142–145. Record, p. 25.

Although he says that, according to his belief, the line was run in 1830, he admits that if a line is run in the spring a grain may form afterwards the same year.

Ques. 128–132. Record, p. 24.

With this concurs the testimony of Joseph Pitman.

Ques. 29–31. Record, pp. 42, 43.

So that according to the testimony of these two witnesses, the east line may have been run in the spring of 1831.

Ques. 300. Record, p. 34.

G. W. M. Pitman also testified that the north line had been run to the Saco river, and that it was a year older than the east one.

Ques. 162–166. Record, p. 26.
Ques. 173. Record, p. 27.

There were a good many spottings in the vicinity of the Albany corner, and many lines run to it, and there were also lot lines running west from the east line.

Ques. 254. Record, p. 31.
Ques. 266–269. Record, p. 32.

He admits that he could not tell the age of the marks on the fir tree on the north line, which he called a corner; and he could not testify that there were more than 30 grains on the chip cut from that tree.

Ques. 343–354. Record, p. 86.

Joseph Pitman, a brother of G. W. M. Pitman, testified that he was a surveyor, and went over the line which run north from the corner of Albany twice with his brother; that he found 46 grains on the spotting on this line in 1876 to within a mile and a half of the north line; upon the last mile and a half, from the spottings, he judged that the line was run in 1850. He thought that the lower part of the line had been spotted twice, the second spotting containing about 38 grains.

Ques. 2–12. Record, p. 41.
Ques. 32–33. Record, p. 33.

On a chip cut from the marked fir tree on the north line, he counted 38 grains, but it nowhere appears in the case from which of the several spots on the tree the chip was taken, whose grains were counted.

Ques. 15. Record, p. 42.

He also testified that he found the letters J. C. or I. C. on one side of the fir tree, and on the other what might have been K. I. N. or K. III.

Ques. 35. Record, p. 43.

Philip Wilkins testified that he was a surveyor, and run in 1850 what he supposed, at the time he began, to be the east line of Elkins' grant; that he did this on behalf of the defendant's grantors.

Record, p. 43.

That he commenced to run north from the south-east corner of the grant, at a hemlock, the corner of Albany; that he found traces of a line running to Sawyer's river, and that it had been run, re-marked and extended further to the north, to within two miles of the north line.

Record, p. 44.

That the difference in age between the first and second marking was from five to nine years; that the line stopped at the pond brook, and that he marked a line from that point to the north line upon which he marked two balsams; that one of these trees was already marked but not as a corner, and this tree he marked Elkins.

Record, pp. 45, 46.

This mark would tend to identify this tree as the corner about which the Pitmans testify.

This witness also testified that, when he begun to run this line north from Albany, he supposed that he would reach Hart's location, and that, when he found that the line would not reach it, he discarded this line as a boundary, and undertook to establish the north-east corner of the grant with one of the owners of the location, and he set up a monument to mark this corner.

Record, pp. 46–48.

That he made a survey of the Saco river, and, taking that as a base line, made a plan of the grant upon which its eastern line adjoined Hart's location until it reached a point on the western boundary of the location nearest to Albany corner.

Record, pp. 48, 50.

It thus appears from the testimony of those of the plaintiff's witnesses who were surveyors, that there were but three marked lines running any great distance north from the corner of Albany; that, in the opinion of the two Pitmans the oldest of these lines was not made earlier than 1830; and that the only line running north of the pond brook was run by Wilkins himself as late as 1850.

James Rogers testifies that he went over this east line, when a young man, with James Willey for the purpose of running the line for Meserve, one of the plaintiff's grantors, but he can not fix the date.

Record, p. 50.

If this line was run as early as 1831, he was but eighteen years old at the time.

This party found an old line that had been spotted some year or two or three years, he could not tell exactly which; they made a new line and went right over the old one and run five or six miles, perhaps more.

Record, p. 51.

According to the testimony of Wilkins the distance from Albany to the pond brook was about five miles.

Record, p. 45.

In his cross-examination, this witness says that they run north until they came out on the turnpike—to what was called the north line of Elkins' grant. He thinks they turned then and ran east to the turnpike.

Record, p. 52.

He has nothing to say about any fir tree on the north line marked as a corner, nor of any attempt to run a

boundary for Meserve south by the westerly side of Hart's location.

There is nothing in this testimony to control that of the three surveyors, that no line had been run north of the pond brook prior to 1850. His testimony may be reconciled with theirs on the theory that, when his party got as far north as the pond brook and found themselves further west than they expected, they turned their course more to the eastward and came out on the turnpike at the termination of the north line.

This witness had never been on this line since that time until the autumn previous to the trial, when he went with G. W. M. Pitman over perhaps two-thirds of the southern part, and came out by the defendant's mill on Sawyer's river.

Record, p. 51.

Mark W. Pierce testified that he went over this east line at some time, he can not tell exactly when, with a party of five or six, on behalf of some of the defendant's grantors; they went northerly from Albany over an old line, until they got to the vicinity of Sawyer's river, where they lost the line; it seemed to be understood that they would lose it there; he does not know how far the distance was before they found it, but *thinks* they found it before they got to the next corner, where they started in towards Lincoln again.

Record, pp. 52, 53.

He was a mere lad at this time and went to carry luggage; he is very vague as to the date and other circumstances of this expedition.

Record, p. 54

Since that time, he had only been over the lower part of the line, having accompanied Pitman and Rogers the autumn preceding the trial.

Record, p. 55.

There is nothing in his testimony to control that of the three surveyors, that no line had been run north of the pond brook prior to 1850.

The only other witness called was Daniel Elkins, an old man, seventy-three years of age, who undertook to testify to conversations that took place forty-five years previously.

Record, pp. 55, 56.

He said that, when he and others were running the south line of Sargent and Elkins grant, (which was the north line of Elkins grant,) about forty-five years previously, they traced an old line until they came to a fir tree marked on three sides from which they started to run north.

Jacob Sargent, one of the party, said that the tree was a corner that he and Squire Cummings helped make when the Elkins grant was run out.

In reply to the question "Was anything said about a line running from that corner to the south," he answered, "He said that was the corner they made when they run the east line of Elkins' grant," and also "He told me that Squire Cummings run that east line."

Record, p. 56.

There was not a particle of evidence as to the way in which, or the time when, this corner was marked nor anything to connect this tree with the one about which the Pitmans testified; nor any evidence of a line running south from it.

Elkins' party estimated the distance from the Lincoln corner to be seven miles and some rods.

Record, p. 57.

This witness reluctantly admitted on cross-examination, that he supposed, when he reached this fir tree, that he had arrived at Hart's location, and that it was his impression that that was the opinion of his party.

Record, p. 59.

He also testified that, two years after the expedition previously referred to, he went upon the line between

Waterville and Albany with Cummings and others, some of whom were owners of the Elkins grant, and that, at the corner of Albany, Cummings pointed out a hemlock tree, which he said was a corner that he made when he run Elkins grant out.

Record, p. 57.

This loose, hearsay testimony in regard to a line run by Cummings, if admissible at all, (and it was received under defendant's objection and exception) can not prevail over the positive testimony of the Pitmans and Wilkins, that there was no line run the length of the east side of the grant at so early a period; especially when the fact is taken into consideration, that the Pitmans were experts employed by the plaintiff to examine this country for the express purpose of finding evidence to be used at the trial of the case.

It may be that Cummings did undertake to run the north line of the grant, and made a corner when he supposed that he had run the required distance from Lincoln, believing that he had then reached Hart's location. This would account for the north line one year older than the east one, of which G. W. M. Pitman testifies.

Ques. 173. Record, p. 27.

He may also have undertaken to run the east line, and have run what surveyors call a trial line from Albany

corner, which was abandoned, when he had gone so far north that he found it would not strike the location at all. Any attempt to run this line must have been made by going north from Albany, for there was no other way to find the required point on Hart's location. This would account for the oldest line which, according to Wilkins' testimony, stopped near Sawyer's river.

There is nothing, we respectfully submit, in the evidence introduced in this case to bring it within any of the classes above referred to.

It clearly does not come within the principle of class "a." There are no monuments referred to in the Elkins grant which were to be erected subsequently by the parties.

Nor does this case come within class "b." No reference is made in the deed to any survey, or to any monuments fixed by Cummings, neither was there any plan annexed to the deed.

Sanborn v. Clough, 40 N. H., 316, 329.

If Cummings ever did make a survey of the tract, there is no evidence as to the time when he made it, or that he was ever authorized to make it in behalf of the

State. By the resolve of the Legislature he was only authorized to act as one of the appraisers.

Record, p. 13.

There is no evidence that he was ever authorized to make a survey by any of the grantees, excepting perhaps Jacob Sargent; or that his acts were ever ratified by any of them.

If the survey was made before the execution of the deed, and this line run as claimed by the plaintiff, it amounts to nothing, for "all negotiations must be taken, so far as the construction of the deed is concerned, to have been merged in the instrument, the conclusive presumption being that the whole engagement of the parties, and the extent and manner of it were reduced to writing."

Wells v. Jackson Iron Co., 47 N. H., 235, 253.

The case at bar is very similar to the one just cited, which was a writ of entry to try the title to the summit of Mount Washington, and which was very ably contested on both sides.

Willey, the land commissioner who made the deed, and Thompson, one of the original grantees in the deed from which the demandants derived title, went around the tract to be granted and erected monuments a few

days before the date of the deed. One of the calls in the description was as follows: westerly by the south line of Low and Burbank's grant to the north-east corner of Jeremiah Chandler's grant, thence due south on the east line of said Chandler's grant, so far, that a due east line, extending to the west line of the said Pinkham's grant, shall contain twelve thousand acres.

The court held that the testimony of Thompson as to this perambulation and the monuments erected by him was inadmissible to effect the construction of the deed, because there was no evidence, that the westerly line over which he passed was the easterly line of Chandler's grant, and because Meserve, one of the grantees was not a party to this transaction of Willey and Thompson.

Ib. 238, 241, 243, 254.

There is no evidence to bring this case within class "c."

There is not a particle of evidence of any agreement between any one representing the State of New Hampshire and the grantees of the Elkins grant, relating to the location upon the earth of the bounds of the grant; or of any agreement between the owners of the Elkins grant and those of the Bean, Meserve and Gilman grant, as to the location of the boundary between them.

Clark v. Wethey, 19 Wend., 320.

The second of the shorter lines was run in behalf of the plaintiff's grantors, according to the testimony of Rogers; and there is no evidence that the defendant's grantors had any knowledge of or participation in this survey.

The preambulation of Mark W. Pierce was in behalf of the defendant's grantors, and is in no way connected with the plaintiff or their grantors.

Wilkins testifies that the line run by him was run as a trial line and not as a boundary.

The evidence tends to prove that whatever lines were run through this wilderness with reference to the east boundary of Elkins' grant, were run under the supposition that they would strike Hart's location.

It has been held that an agreement establishing boundaries, if made under a mistake of fact, may be repudiated by one of the parties upon discovering his mistake.

Coon v. Smith, 29 N. Y., 392.
Liverpool Wharf v. Prescott, 7 Allen, 494.
Avery v. Baum, Wright, 576.
Brewer v. Boston and Worcester R. R., 5 Met., 478.

If a person is mistaken as to his boundary and points out the wrong one, that will not control and restrict the operation of his deed.

Clough v. Bowman, 15 N. H., 504.
Crowell v. Beebe, 10 Vt. 33.

There has been no acquiescence on the part of the defendant or his grantors in any boundary which is evidence tending to show an agreement establishing it.

The mere fact that two or three lines have been run through a wilderness has not the slightest tendency to prove any acquiescence in such lines as boundaries. There is no evidence of any definite, positive and continuous occupation on the part of the plaintiff up to the boundary claimed in the writ.

Smith v. Hosmer, 7 N. H., 436.
Hale v. Glidden, 10 N. H., 397.
Thompson v. Burhans, 79 N. Y., 93.

There can be no pretence that the defendant or his grantors have done anything which shall operate by way of estoppel to deprive him of any land granted by his deed.

V.

The court properly directed the jury to return a verdict for the defendant.

The question is not whether there was literally no evidence bearing upon the plaintiff's case, but whether there was any upon which the jury could properly find

a verdict for him, the burden of proof being upon him. The state of the evidence in this case was such that the defendant would have been entitled to a new trial if the jury had found a verdict against him.

Bowditch v. Boston, 101 U. S., 16, 18,

and cases there cited.

Upon this question of evidence, the presumption is that the judge in the court below decided correctly, and the burden is on the plaintiff in error to show the contrary.

The only remaining subject for consideration is that of the admissibility of the question put by the defendant's counsel to the witness Wilkins upon cross-examination: "From what point in the west line of Hart's location did you propose to start to strike the north-west corner of Albany?"

Record, p. 48.

The plaintiff will not be entitled to a new trial on account of an erroneous ruling, unless he shows that he was prejudiced by it. This exception has become immaterial from the fact that the plaintiff has failed to produce evidence enough to sustain his case; he cannot therefore have suffered any harm from the answer of Wilkins, even though the court should hold its admission improper.

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